Amalgam in the Americas: A Law School Curriculum for Free Markets and Open Borders

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I. INTRODUCTION: THE PROBLEM DEFINED

In recent decades, regional economic integration has transformed the Americas.[1] The boldest of the integration initiatives is the North American Free Trade Agreement ("NAFTA").[2] NAFTA's effect on

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1. Examples include the Caribbean Common Market, July 4, 1973, 946 U.N.T.S. 17 [hereinafter CARICOM], a treaty establishing the Caribbean community; the Mercado Commun del Sur, March 26, 1991, 30 I.L.M. 1041 [hereinafter MERCOSUR]; and the Agreement on Andean Subregional Integration, May 26, 1979, 8 I.L.M. 910. President Clinton has recently reaffirmed a commitment to a proposed a Free Trade Area of the Americas [hereinafter FTAA]. In October 1997, while meeting with leaders in Buenos Aires, Argentina, Clinton remarked, "It is clearly in the United States' interest to be in the forefront of [the effort to build a Free Trade Area of the Americas] for the next generation .... The United States welcomes constructive efforts by others to bring our hemisphere together .... Every step taken ... helps to build momentum toward what I believe should be all our ultimate goal, a free trade area of the Americas." Christian Chaise, *Clinton Winds Up Official Visit to Argentina*, Agence France-Presse (Oct. 17, 1997), *available in* 1997 WL 13415948.

2. North American Free Trade Agreement, December 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 [hereinafter NAFTA].

Mexican, Canadian and American societies is still inchoate, but portends steady growth. NAFTA covers an area of nearly 9.4 million square miles and applies to approximately 380 million people.[3] The combined economic output of NAFTA signatories approximates 6 trillion annually.[4] Since NAFTA entered into force on January 1, 1994, U.S. trade with Canada and Mexico has increased by 44%.[5]

North American economic integration has burgeoned notwithstanding the maintenance of traditional political boundaries. Flourishing economic cohesion assuredly creates tensions. Service providers are now expected to advise and to participate in transnational movements of financial and human capital. Despite these expectations, the reality is service providers remain educated in and licensed by traditional political units. Additionally, service providers' ability to practice is generally limited to the specific political unit in question.

This is particularly true in the case of lawyers. Professional protectionism is the foundation upon which the history of legal practice rests. Local licensing arrangements[6] govern who can and cannot practice in a certain jurisdiction; local bar associations determine market entry and thus exert monopolistic power.[7] Admission into this market is often predicated upon satisfaction of enumerated educational, residency and

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3. *See* NAFTA AND THE ENVIRONMENT 163 (Daniel Magraw ed. 1995).

4. *See id.*

5. *See U.S. Department of Commerce, Study on the Operation and Effect of the North American Free Trade Agreement* (visited July 11, 1997) <http://www.sice.oas.org/forum/p_sector/govt/nafta_repe/>. Real income growth in the United States, Canada and Mexico is higher under NAFTA: the United States and Canadian gains are 0.5%; for Mexico, the gains are almost 3.5%. Employment and real wages have risen in all three countries. Trade has substantially increased, with United States and Canadian exports to Mexico rising about 19% and Mexican exports to the United States and Canada rising about 18%. *See* MICHAEL A. KOUPARITSAS, A DYNAMIC MACROECONOMIC ANALYSIS OF NAFTA 14-35 (1996). Addressing NAFTA from a broader perspective, which may well illuminate the future directions in which professional integration may be heading, *The Economist* reports that "[i]t is in politics, not economics, that NAFTA has had its biggest impact. The trade agreement has come to symbolise a close, and perhaps irreversible, embrace between Mexico and the United States." *The NAFTA Effect, When Neighbours Embrace*, THE ECONOMIST, July 5, 1997 at 21, 22.

6. These requirements are often subnational in nature. For example, in Canada legal practice is supervised at the provincial level. Attorneys licensed in one province who wish to practice in another generally have to write and pass the other province's bar examination (and sometimes complete additional apprenticeship requirements). These local barriers have survived notwithstanding constitutional guarantees of freedom of mobility within Canada. Such barriers also operate in the United States. In Mexico, certification is also made at the subnational (state) level. However, once licensed, a legal practitioner may practice in any Mexican state. The Mexican constitution stipulates that once a lawyer is certified to practice, the certification is to be given full faith and credit throughout the country. *See, e.g.*, Barker, *infra* note 9, at 116-17.

7. *See* Michael J. Chapman & Paul J. Tauber, Note, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services*, 16 MICH. J. INT'L L. 941, 950 (1995).

citizenship requirements. Although possibly ensuring some element of professional competence prior to certification, admission requirements may also serve to limit the number of "outside" practitioners entitled to practice within the local jurisdiction. Paradoxically, however, the growing complexity of international commercial transactions, together with the mobility of capital and labor, has increased the demand for transnational legal advisors.[8] The result is the emergence of a growing disparity between the demands placed on the legal community and the abilities of the legal community to supply the skills needed to master an expanding transnational practice. Unless these abilities can be upgraded, the public interest will not be protected. Nor will the integrity of the legal profession be preserved.[9] As noted by John Sexton, "there are few significant legal or social problems today that are purely domestic .... It is virtually impossible to avoid the transnational implications of almost any subject."[10]

The situation within NAFTA is especially problematic. The three member-nations each represent a different legal culture. The American

8. *See* Orlando A. Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATT and NAFTA*, 5 MINN. J. GLOBAL TRADE 159, 160-61 (1996) (outlining the role foreign lawyers can play in international transactions). *See also* Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37, 60 (1993) (referring to the concept of "global legalism," which is defined as "a global growth in the general pervasiveness of law"); J. De Vries, *The International Legal Professional—The Fundamental Right of Association*, 21 INT'L LAW 845, 845-46 (1987) (describing how a profession formerly characterized by an almost absurd attachment to national boundaries has now become a major part of international trade in services). This increased demand operates not only within the private commercial sphere, but also in administrative and regulatory law. For a discussion of how NAFTA affects public interest lawyers and their practice, see David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407 (1994).

9. Julie Barker, *The North American Free Trade Agreement and the Complete Integration of the Legal Profession: Dismantling the Barriers to Providing Cross-Border Legal* Services, 19 HOUS. J. INT'L L. 95, 106 (1996), has noted that national differences in terms of legal structure and education "only contribute to the barriers that exist against the internationalization ... of the legal profession." Within the specific context of NAFTA, James F. Smith, *Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA*, 1 U.S.-MEXICO L. J. 85, 86-87 (1993), echoes this conclusion. "United States and Mexican legal traditions (private law), constitutions (public law), and political systems are so markedly different that legal training and law practice in one country is more likely to hinder rather than aid United States and Mexican lawyers in understanding their neighbor's legal system." *Id.* (footnotes omitted).

10. John Edward Sexton, *The Global Law School Program at New York University*, 46 J. LEGAL EDUC. 329, 331 (1996).

legal system, while rooted in the common law, has developed many unique characteristics, including a proactive judiciary. Historically, Canada placed one foot in the common law and the other in the civil law. However, through time, a *sui generis* system has emerged in which the common law permeates national legal culture. The Mexican legal system is civilian in origin; it is codified and relies heavily on administrative agencies as opposed to judicial decision-making. Mexican legal culture is also unique because the mobilization to the rule of law—and away from the single-party state—has been recent.

NAFTA creates a demand for lawyers in one NAFTA jurisdiction who can advise clients in another NAFTA jurisdiction regarding the law of one of the other NAFTA parties, or on matters of the new NAFTA supra-law.[11] At a minimum, NAFTA will require lawyers to learn the basic precepts of the legal systems of all NAFTA parties.[12] Without proper education in the basic precept areas, NAFTA legal service providers may be unable to fulfill expectations, and bar associations may be reluctant to endorse mutual recognition obligations. The three legal cultures will remain disparate instead of functionally harmonized. Consequently, the maximum benefits possible under NAFTA will not be realized.

Within the context of NAFTA, understanding the legal structure of other signatories requires familiarity with both common law and civil law. Although a fairly large number of civilian lawyers attend LL.M. programs in the United States,[13] few American lawyers learn the civil

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11. Trubek, *supra* note 8, at 468, underscore the important role of law in NAFTA trade integration. They label this the process of "juridification." *Id.* According to Trubek, "[l]aw and the legal field is profoundly interwoven into this larger struggle over the nature and course of North American integration." *Id.* The academic literature has considered the importance of "globalization" on the American law school, as seen in John B. Attanasio's Article, *The Globalization of the American Law School*, 46 J. LEGAL EDUC. 311 (1996) and other contributions to 46 J. LEGAL EDUC. (1996) regarding the Globalization Symposium. However, there has been considerably less discussion on the implications of regional integration on law schools. This is unfortunate given that it is often through regional implementation that vague norms of globalization become translated into daily practice. As noted by Kyriakos D. Fountoukakos, Legal Education in the Global Era: Cosmopolitan Grande Dame or Country Bumkin? (Dec. 1997) (unpublished manuscript, on file with the author, Columbia Law School) 14, "Even through the importance of international supra-national law should not be underestimated, it is regional supra-national law . . . which has had the deepest and widest effects on heretofore national legal orders."

12. Smith, *supra* note 9, at 86.

13. *See* Julia E. Hanigsberg, *Swimming Lessons: An Orientation Course for Foreign Graduate Students*, 44 J. LEGAL EDUC. 588, 590 (1994). The many lessons I learned from instructing the U.S. Legal Methods and Problems Course at Columbia University (geared toward introducing civilian lawyers to the essentials of the American common law) serve as an inspiration for the course proposed in this paper. *See infra* note 156.

law, especially the civil law of Mexico and Mexico's Latin American counterparts. Surprisingly, American and Canadian law schools have paid little attention to preparing graduates for the type of transnational legal practice that will arise under NAFTA.[14] A lack of preparedness at the graduate college level has invariably led to "a lack of knowledge on the United States side of Mexican law [which] has appropriately been characterized as 'appalling.'"[15]

This Article addresses this *lacuna* by investigating ways in which the American and Canadian common law curriculum could become more responsive to the changing realities of legal practice under NAFTA. Three modifications are envisioned. Potentially the following modifications could be introduced on a gradual basis:

1. Introduction of a course to familiarize common law lawyers with the method, principles and practice of civil law, with a directed focus on Mexico;
2. Initiation of a broader NAFTA curriculum, potentially leading to a certificate or designation; and
3. Development of a new law degree, universally recognized in all three NAFTA jurisdictions as a prerequisite to bar admission domestically as well as *supra*-nationally.

These curricular modifications could facilitate economic and occupational harmonization within NAFTA. Implementing the changes could permit law schools in particular, and the academy in general, to play key roles in educating and guiding the lawyers who will provide the

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14. *See* Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT'L & COMP. L. 401, 420, 423 (1995). Zamora states that "[t]raditionally, legal education in North America has ignored the relevance of comparative legal studies focusing on the legal systems of neighboring countries. U.S. law schools rarely teach courses on Mexican and Canadian law." *Id.* at 423. He also states that "[i]n the past... Canadian, Mexican and U.S. universities devoted little attention to research in their neighbors' legal systems...." *Id.* at 420. Zamora also notes:

> [O]ur past history has not been characterized by efforts to... [pay] much attention to our neighbors' legal systems. Until recently, the number of U.S. lawyers who knew anything about Canadian or Mexican law was very small; the number of Mexican lawyers who were expert in United States or Canadian law, or Canadian lawyers knowledgeable about Mexican law, was equally negligible.

Id. at 406.

15. Smith, *supra* note 9, at n.13, *citing* Sharon D. Fitch, *Dispute Settlement Under the North American Free Trade Agreement: Will the Political, Cultural and Legal Differences between the United States and Mexico Inhibit the Establishment of Fair Dispute Settlement Procedures?*, 22 CAL. WEST. INT'L L. J. 353, 387 (1992).

transnational services of the future.[16] Of course, the introduction of mutual and reciprocal certification would depend on coordination between local bars and law societies.[17] Such coordination lies beyond the scope of law schools and this Article. Nonetheless, effective licensing coordination cannot occur without proper transnational legal education. One necessary step involves detaching elements of the legal curriculum from the nation-state in which the law school is located.

II. THE INTERNATIONALIZATION OF LEGAL PRACTICE UNDER NAFTA

Technological innovations have permitted capital markets to develop globally.[18] As a result, economic efficiency is increasingly being evaluated on a transnational basis rather than at the community or local level. This powerful shift in the *locus* of market activity has obliged service providers to follow suit. Lawyers are no exception. International law practice is expanding so rapidly that some scholars suggest it may dominate legal activity in the next century.[19] The MacCrate Report on Legal Education and Professional Development echoes these findings in a more moderate fashion. It concludes:

> [E]vents of the last several years have had profound repercussions in international commerce and finance, creating new capital markets, channels of trade and wholesale privatizations, all of which portend new law and regulation and the need for expert legal counsel equipped to advise both government and

16. Notwithstanding the derailing of President Clinton's request for fast-track authority to negotiate with Chile, and the inhibiting effect this has had on the negotiations, economic harmonization in the Americas will likely continue to grow. As a result, these curricular modifications might also facilitate receptiveness to and constitute a precedent to structure NAFTA participation for nations such as Chile, Brazil and Argentina. *See* Lisa Anderson, *The Future of Hemispheric Free Trade: Towards a Unified Hemisphere?*, 20 HOUS. J. INT'L L. 635 (1998).

17. This concept highlights the necessity for harmonized bar admissions processes, as well as some type of level playing field in terms of the requirements for apprenticeships (mandatory in Canada and Mexico, non-existent in the United States other than in Vermont and Delaware). *See* Barker, *supra* note 9, at n.195.

18. Zamora, *supra* note 14, at 405-406. Zamora remarks that "globalization" is:

> defined by one author as "the process of denationalization of markets, laws and politics in the sense of interlacing peoples and individuals for the sake of the common good." While science and communications have fostered a global economy, they have also complicated the adoption and enforcement of legal rules, creating new problems for international lawyers.

Id. at 405-06, *citing* José Delbruck, *Globalization of Law, Politics, and Markets–Implications for Domestic Law–A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9, 11 (1993).

19. *See* Jill J. Ramsfield, *Is "Logic" Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. LEGAL EDUC. 157, 158 (1997). *See also* Alberto Bernabe-Riefkohl, *Tomorrow's Law Schools: Globalization and Legal Education*, 32 SAN DIEGO L. REV. 137, 149 (1995) (discussing the expansion of international law practices).

private enterprise regarding an emerging new international legal regime.[20]

In many ways, the architects of the new international economic order are creating demands greater than what the service-provider market can supply. Within the context of North America, this is most apparent in the fact that Chapter 12 of NAFTA contemplates relatively free mobility for service providers, which includes lawyers.[21] Yet no licensing regime has been developed to guarantee that service providers qualified in one NAFTA jurisdiction will be able to offer professional and competent advice in the other political units which comprise NAFTA.[22]

Chapter 12 generally addresses "cross-border trade in services."[23] For the purposes of an attorney, "cross-border trade in services" breaks down into two principal components: (1) having a client from a NAFTA jurisdiction other than the jurisdiction where the attorney is licensed; and (2) providing legal services in a NAFTA jurisdiction other than the jurisdiction in which the attorney is licensed.[24] Articles 1202 and 1203 extend both national treatment ("NT") and most-favored nation treatment ("MFN") to all NAFTA service providers.[25] As a result, NAFTA nationals who provide services will no longer be treated any less favorably than nationals from other NAFTA countries. Article 1204 requires member nations to treat NAFTA service providers as nationals of that member nation, or as nationals from a country with MFN status.[26]

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20. *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum*, American Bar Association, Section of Legal Education and Admissions to the Bar 85 (July 1992) [hereinafter MacCrate Report]. Notwithstanding (and amazingly), the MacCrate Report does not make any recommendations on how law schools and bar associations can prepare for this globalization.

21. *See* NAFTA, *supra* note 2, arts. 1202, 1203, 32 I.L.M. at 649. The fact that a broad array of professionals is included in the service providers category places integration pressures on educators in fields other than law. However, in many cases such other fields are not locally idiosyncratic. Law, on the other hand, tends to be locally-based and consequently has more changes to make in order to face up to integrative pressures that care little for regional peculiarities. *See also* Barker, *supra* note 9, at 100 (indicating that lawyers are "service providers" for the purposes of Chapter 12).

22. *See* Barker, *supra* note 9, at 102-03.

23. NAFTA, *supra* note 2, art. 1201, 32 I.L.M. at 649. *See also* Barker, *supra* note 9, at 100.

24. *See* Barker, *supra* note 9, at 100-01.

25. NAFTA, *supra* note 2, arts. 1202, 1203, 32 I.L.M. at 649.

26. *Id.* art. 1204, 32 I.L.M. at 649. The fact that licensing requirements are generally undertaken by state or provincial units in Mexico, the United States and Canada injects a further complicating factor into the harmonization process. At the same time, as discussed *infra*, it also offers the possibility for subnational cooperation. This

NT and MFN status will consequently affect licensing guidelines as well as other barriers to practicing law in each of the NAFTA jurisdictions.

Some NAFTA occupational integration requirements are prospective. For example, Article 1206 states that the commitment to dismantle barriers to cross-border services will not invalidate currently existing non-conforming laws.[27] However, such non-conforming laws must be listed in two separate annexes, one for federal measures and one for local measures.[28] Notwithstanding permitting existing non-conforming laws to remain valid, NAFTA parties have committed themselves to liberalize and remove quantitative restrictions to professional entry, together with licensing requirements.[29] In the end, "existing laws set out in these Annexes are grandfathered in and regarded as standstill obligations—the NAFTA member countries are allowed to maintain or decrease their current limitations as to cross-border trade in services. Nonetheless, they are not permitted to increase these restrictions."[30]

In other areas, though, NAFTA introduces more proactive requirements.[31] For example, citizenship and permanent residency are to be eliminated as licensing requirements for professional service providers.[32] Education and nationality, which often constitute disguised trade restrictions, can no longer form a basis for legal licensing, which

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may actually accelerate the integration process, although perhaps in a checkerboard fashion.

27. *Id.* art. 1206(1)-(2), 32 I.L.M. at 649.

28. *See id.*

29. *See id.* art. 1207(4), 32 I.L.M. at 650-51. The NAFTA also creates a new non-immigrant worker category called Trade NAFTA ("TN"), under which Canadian ("TN-1") and Mexican ("TN-2") professionals may temporarily enter (in increments of one year) the U.S. to "engage in business activities at a professional level". *See* 8 C.F.R. § 214.6. Appendix 1603.D.1 to Annex 1603 of the NAFTA lists a set of approved professions. Individuals who are members of a state or provincial bar (including notaries in Québec) *or* who possess a J.D., LL.B. [Canadian common law degrees], LL.L or B.C.L. [Canadian civil law degrees], or Licenciatura [Mexican law degree, consisting of five years of study] are eligible to be considered "lawyers" for the purposes of Appendix 1603.D.1. The modalities of legal education in Canada, the U.S. and Mexico, together with an overview of the basic law degree in each jurisdiction, are discussed *infra* in Part V of this Article. The TN non-immigrant category simplifies, from an immigration perspective, the ability of lawyers in one NAFTA jurisdiction to actually work in another NAFTA jurisdiction. However, the extent to which that individual will be able to dispense legal advice is more a matter for the professional integration provisions of the NAFTA, together with agreements made among national and subnational bar associations.

30. Barker, *supra* note 9, at 101-02.

31. Collaterally, the NAFTA parties negotiated an Annex regarding "Foreign Legal Consultants." This Annex endeavors to harmonize the rules related to such consultants, who principally offer legal advice but do not appear in court or as members of the local bar. This harmonization process has resulted in a recent agreement among professional lawyers' associations in the U.S., Canada, and Mexico. *See Canada, U.S. and Mexico OK Foreign Legal Consultants*, 8 NATIONAL 40 (Jan./Feb., 1999).

32. *See* NAFTA, *supra* note 2, art. 1210(3), 32 I.L.M. at 650-51.

must now be based on objective criteria such as competence and ability to provide the service in question.[33] The role of harmonized and effective legal education among NAFTA parties thus assumes considerable importance, as the skills learned in the educational context will provide much of the familiarity with the legal systems of the other NAFTA parties necessary to practice there with any degree of competence. Along similar lines, NAFTA Annex 1210.5 urges NAFTA parties to pursue the recognition and harmonization of certification requirements by developing mutually acceptable professional standards and criteria.[34] These can be developed among sub-national or national units.[35] It is in this capacity that legal educators stand poised to play a pivotal role. Pedagogical standards, types of examinations, years of schooling, and writing requirements are important elements of reciprocal certification systems.[36]

Administratively, NAFTA has created consultation mechanisms for the removal of licensing and residency requirements.[37] Parties are to consult "periodically" in these areas, and at least every two years for the purpose of removing quantitative restrictions on professional entry.[38] NAFTA Annex 1210.5 binds NAFTA signatories to establishing a work program and timetable for encouraging regulators of legal services to develop mutually acceptable professional standards and criteria and creates a review mechanism to monitor progress in this reconciliation. At present, there are working panels under NAFTA actively

33. *See id.* art. 1210(1), 32 I.L.M. at 650.

34. It must be underscored that Article 1210(2)(a) stipulates that MFN status does not require a party to recognize education, experience, licenses or certifications from another party's territory. Nonetheless, subsection Article 1210(2)(b) allows a party to recognize unilaterally, or by agreement, such education, experience, licenses or certifications. If such recognition is made, a reciprocal obligation is placed on the recognizing party to afford an opportunity to the third NAFTA party to show that it, too, should benefit from such recognition. *See id.* art. 1210, 32 I.L.M. at 650.

35. Flores, *supra* note 8, at 185 (concluding that "'an agreement can be reached between lawyers from Ontario, Illinois and/or the Federal District of Mexico, the benefits of which need not be extended automatically to practitioners from other United States, Canadian or Mexican jurisdictions if [they] are unable or unwilling to abide by its rules.'") (footnote omitted).

36. Barker, *supra* note 9, at 135-36. As Barker notes, "Standardizing, to the extent possible, the curriculum choices and offerings among the legal institutions and encouraging closer relationships will only assist in the internationalization and harmonization of the legal profession." *Id.*

37. NAFTA, *supra* note 2, arts. 1207(4), 1210(4), 32 I.L.M. at 650-51.

38. *Id.*

investigating this integration.[39] Consequently, negotiations regarding integration of legal service providers are not closed, but ongoing. In this regard, one of Chapter 12's greatest successes lies in creating a concrete structure for future negotiations at the national and subnational level. These negotiations will define what it means to be a North American lawyer in the twenty-first century. The importance of the decisions to be made, invites, if not demands, law school participation at the ground level in the discussion.

In the past, law schools have played key roles in sculpting the shape and content of the United States legal profession. Robert Stevens remarks that "the centrality of law in American life, coupled with the historical functions of legal education, has ensured that the schools have been at the very core of the debates about the profession and its role, as well as the nature of law itself."[40] Now is not the time to remain silent. The challenges posed by NAFTA necessitate the attention and expertise of the law schools.

III. OVERVIEW OF THE MEXICAN, CANADIAN AND UNITED STATES LEGAL SYSTEMS: WHAT EXACTLY ARE WE TRYING TO HARMONIZE?

Briefly surveying the essentials of the legal systems of NAFTA signatories provides considerable insight into types of barriers that a standardized legal education will have to overcome.[41] This task also helps identify some of the key similarities and differences between legal systems of which any attorney must be aware in order to develop the necessary expertise to succeed in a transnational NAFTA practice.

A. The Mexican Legal System

The Mexican legal system cannot be understood in isolation from its civil law heritage. Civil law emerged from Twelve Tables of the

39. Barker, *supra* note 9, at 132. *See also* Zamora, *supra* note 14, at 415 ("Lawyers from Canada, Mexico, and the United States have begun trilateral discussions on cross-border trade in legal services, for the purpose of making recommendations to their respective governments on the treatment to be given to legal service providers in NAFTA countries.").

40. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S xiii (1983).

41. While this overview is necessarily cursory, comparative studies of the Canadian, Mexican and American legal systems have given rise to lengthy scholarship. Much of such scholarship focuses on conceptual and theoretical differences between legal systems, and taps into the wealth of literature contrasting civil law from common law. *See, e.g.*, JOHN HENRY MERRYMAN & DAVID CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS (1978); RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (3d ed. 1985); JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION (2d ed. 1985).

Republic of Rome, adopted in the fifth century B.C.[42] The laws of the Twelve Tables applied only to the citizens (in Latin, *civis*) of Rome and, hence, formed the *ius civilis*, or "civil law."[43] The civil law is thus "older" than the common law, which emerged from the Court of William the Conqueror in the late eleventh century. After the fall of the Roman Empire, and throughout the Dark Ages, the civil law lay dormant in Western and Central Europe.[44] It was revived and "rediscovered" at the end of the eleventh century by scholars at the University of Bologna.[45] The important role academics played in "rediscovering" and defining the civil law directly accounts for the deference that civil law practitioners give both academic treatises and compendia to this date.

A hallmark of the modern (i.e. post-1800) civilian legal system is the fact that the law is codified in a "civil code."[46] The codified volume is the one true source of law. Mexico is no exception to the codification phenomenon. Nonetheless, unlike other jurisdictions with one singular or exclusive code, in Mexico there are several important codifications in the private law sphere. For example, the Civil Code of the Federal District focuses on voluntary and involuntary obligations, and property. States and subnational entities often have their own codes governing matters within their legislative spheres. There are also codes specific to certain substantive areas. For example, exchanges and taxes often operate in conjunction with satellite legislation. Collateral to codified and legislated sources of law are academic interpretations of ambiguous provisions. Little, if any, "judge-made" law exists in Mexico. Judges are expected to manipulate the provisions of the code and "discover" a resolution to a dispute from within its provisions, with the thought that inspiration will be drawn from academic doctrine.[47] This is standard for

42. Gary F. Bell, *The U.S. Legal Tradition in Western Legal Systems, in* LEGAL METHODS CASES AND MATERIALS 19, 20-21 (Jane C. Ginsburg ed., 1996).

43. *Id.* at 20-21.

44. In the Eastern Roman Empire, Emperor Justinian published an articulation and reformulation of Roman law, the *Corpus Iuris Civilis,* in 529-34 A.D. This *Corpus* remained in force in the Eastern Roman Empire until the fifteenth-century conquest by the Ottoman Turks. *Id.* at 21.

45. *Id.*

46. There are some civilian jurisdictions without an organic civil code, such as Scotland and South Africa, but these are exceptional.

47. This skepticism of the role of the judges dates from the French Revolution. The French Napoleonic Code of 1804, the first modern civil code, felt the "reactionary" judiciary "must be relegated to the role of applying, not interpreting, legislative norms." This understanding as to the proper role of the judiciary was exported to Latin America. Smith, *supra* note 9, at 88; *see also* Barker, *supra* note 9, at 104.

most civil law systems.[48]

The Mexican private law is strongly influenced by the French and Spanish models. In this regard, it shares history with the civil codes of Québec and Louisiana. However, these two jurisdictions have, due to their minority position within a dominant common law system, lost many of the procedural and methodological characteristics of the civil law.[49] The difference between the practice of law in Mexico and the practice of law in Louisiana or Québec is considerable. In fact, this difference is much more significant than any dissonance Louisiana or Québec civilian practitioners may experience when called upon to advise on matters of New York or Ontario law. In large part, this is due to differences in the "public law".[50]

"Public law" within the civilian legal system falls normally to the preserve of the legislature, and legislative acts populate the horizons of criminal, labor and administrative law.[51] Such is the case in Mexico. The governing document in the public law area is the Mexican Constitution of 1917. This document—which is lengthier and more detailed than its United States and Canadian counterparts—organizes the national government along republican and federal lines. There are three branches to the Mexican government: executive, legislative (bicameral) and judiciary (appointed by executive, with Senate approval).[52] Separate state governments also exist. The Constitution also contains a Bill of Rights, which encompasses goals of economic and social justice, born out of the anti-*caudillo* (rural land chieftains) era in which the Constitution was originally promulgated.[53]

Over the years, the reality of government in Mexico has diverged from the words of its Constitution. The principal factor in this divergence is the growth of executive dominance—*el presidencialismo*.[54] This executive dominance significantly affects other aspects of government, including the erosion of the rights and powers of the states[55] (in a manner similar, though more blunt, than in the United States). More important is the effect of presidential power on the development of Mexican

48. In Mexico, however, concentration of power in the executive has likely made judges weaker than in other civil law jurisdictions. *See* discussion *infra* text accompanying notes 49-58.

49. *See* discussion *infra* text accompanying notes 189-195.

50. *See* Smith, *supra* note 9, for a more detailed overview.

51. There is a sharp distinction between public law and private law within modern civil law. *See* Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 TUL. L. REV. 1591, 1595 (1992).

52. *See* Smith, *supra* note 9, at 91-92.

53. *See id.* at 91, 92, 94.

54. *Id.* at 87.

55. *See id.* at 96.

democracy and the vitality of the Mexican legislature. Only in recent years has power become increasingly polycentric, in large part in response to Mexico's desire to open its borders. Notwithstanding, in Mexico the president initiates legislation, with legislative approval usually forthcoming.[56] The president has extensive appointment power, including the power to appoint a successor.[57] As noted by one scholar, "[t]he [Mexican] President occupies the place of a European king in the 18th century."[58]

Foreign lawyers wishing to practice in Mexico must be mindful of the effect presidential authority and discretion has on the structure of the Mexican legal system, in addition to the mindset of the Mexican lawyer. In terms of commercial transactions, Article 131 of the Constitution accords the executive branch extensive authority regarding imports and exports, as well as the transport of goods and provision of services.[59] Additionally, Article 131 provides the power to impose control over pricing, rationing and distributing commercial goods.[60] The executive also maintains extensive law-making capacity through the President's regulatory power. Despite the executive branch powers, a 1987 Constitutional amendment gave the Mexican Supreme Court discretionary authority to hear cases of constitutional significance, thereby enhancing its status as a court of last resort.[61] Nonetheless, one scholar has opined that it would be unlikely for a Mexican court to challenge an executive regulatory decree on constitutional grounds;[62] it seems possible, though, that NAFTA may further enhance the role of judicial authority as a gatekeeper of executive accountability. For the moment, however, "[t]he power and prestige of the Mexican Supreme Court pales in comparison to the high court of the United States."[63] The Mexican judiciary is "far less significant as a political institution than in the United States."[64]

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56. *Id.* at 98.
57. *See id.* at 101.
58. *Id.* at 98 n.70.
59. *See id.* at 99.
60. *See id.*
61. *See id.* at 102.
62. *See id.* at 99-100.
63. *Id.* at 103.
64. *Id.* at 89. *See also* Zamora, *supra* note 14, at 413 ("[A] relatively weak judicial system, and the predominance of administrative or non-judicial forms of law enforcement [constitute] a model that coincides with perceptions of the authoritarian style of Mexican government.").

To grasp the essentials of Mexican practice, common law practitioners must develop a comfort level with the fundamental differences between the civil law and the common law as well as the peculiarities of the Mexican legal structure. Although there has been a moderate convergence between the civil and common law systems in recent decades, some important underlying differences still exist.[65] The differences can be summarized as follows:

1. Sources of Law

In Mexico, cases are not the primary source of law. Statutory codes, legislation, academic writings, and administrative regulations represent the primary sources of law. Under no circumstance can the code be compared to any U.S. *Restatement*, which simply describes the extant case law and is not binding authority. It is somewhat more analogous to the Uniform Commercial Code. The code is the law; it eradicates what came before and is indicative of what is to come.[66] Even if a long chain of judicial cases decided on the same *ratio* is established, the established case law is at most an auxiliary source of law. As a result, cases do not form the basis of legal education. Cases are not a significant part of the repertoire of primary authority a practitioner will rely upon when drafting legal submissions.[67] Decisions will not, for example, contain important interpretations of what a corporation can or cannot do in a financial matter.[68] If decisions decide something, that body of case law

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65. *See* Mary Ann Glendon, *The Sources of Law in a Changing Legal Order*, 17 CREIGHTON L. REV. 663, 666 (1984). *See also* Ugo Mattei & Roberto Pardolesi, *Law and Economics in Civil Law Countries: A Comparative Approach*, 11 INT'L REV. L. & ECON. 265 (1991).

66. *See* Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage Over the Civil Law*, 12 TEMPLE INT'L & COMP. L.J. 87, 93-94 (1998).

> [The] centerpiece is the civil code, a vast elaboration of legal concepts, definitions, institutions, principles, and rules stated at a high level of generality and purporting to cover the entire realm of private relations: persons and the family, adoption, succession, property rights, contractual obligations, agency, surety, unlawful harm-causing acts, labor, companies, prescription of actions, evidence, creditor preferences, and others.

Id.

67. Nor are they particularly informative. *See* Smith, *supra* note 9, at 89 ("Dissenting or concurring opinions are a rarity. Federal appellate opinions are published but they are usually quite brief, simply stating the basic facts and dispositive legal principles.").

68. This is not to say that civilian judicial pronouncements are not more important than they used to be. In certain European jurisdictions, like France and Germany, there are actually some "court-made" areas of law—for example in the area of tort. This phenomenon is yet not as active in Mexico. As pointed out by Smith, *supra* note 9, at 88:

> An American lawyer who reads legal writings by a Mexican jurist is struck by more frequent references to primary (statutes) and secondary (treatise writers)

will usually have little binding effect on future individuals—even with an identical factual scenario.

It is important for law students to develop a comfort level with the contrasting use of judicial authority. After all, "American lawyers continue to be frustrated by the absence of controlling case law in Mexico while Mexican lawyers fail to appreciate why the 'plain meaning' (or deductive analysis) of the United States Constitution or statute is not determinative."[69]

2. *Methods of Interpretation*

When Mexican courts are called upon to apply the code or legislation in Mexico, they do not follow interpretive patterns characteristic of common law countries. Civilian judges approach the code differently than legislation. Civilian judges will seek to interpret the code generously in what is called the "teleological" approach: the code is to be detached from its historical context, given a meaning which satisfies the current sense of justice, and applied according to its purpose.[70] Concerning more specific legislation or regulation, judges tend to adhere to a "plain meaning" or "the text says what it says" rule.[71] In common law societies, private and public law legislation is often viewed as an exception or abrogation from the common law (created through judicial pronouncements in cases), and is thus more restrictively interpreted. Greater attention is also focused on legislative intent.

3. *Role of Judges*

Judges do not "make law" in Mexico. The legislators and, more indirectly, the university professors do. Professors create what is called "doctrine," a subtext to the code, which is highly probative.[72] Common-

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sources than to case law. Often it is simply the straightforward application of logic that motivates Mexican legal writing. Much attention is devoted to describing the pertinent legal history, which often comes from Roman law or even earlier sources.

69. Smith, *supra* note 9, at 91.

70. Of course, civilian judges maintain that, since the purpose of the text itself is the basis of determination, they are simply interpreting extant law as opposed to creating it.

71. *See* Smith, *supra* note 9, at 91.

72. Max Rheinstein, *Law Faculties and Law Schools. A Comparison of Legal Education in the United States and Germany*, 1938 WIS. L. REV. 5, 6 (1938) ("While the common law of England and America was essentially shaped by judges, the civil law of

law judges often make both law and policy.[73] Civilian judges, when searching for the "purpose" of a code provision, are usually unmoved by policy arguments: the definition of "purpose" will come from within the collateral provisions of the code or pronouncements by the legislature. As civil law judges are essentially civil servants, they cannot readily sculpt public policy.[74] Paradoxically, however, civilian judges are more inquisitorial and interventionist during court proceedings. Because there are no juries, and thus no "trials" in the common law sense, civilian judges decide both factual and legal questions.[75] Civilian court proceedings tend to be less adversarial, and pre-trial activities such as discovery, interrogatories and disclosure are more circumscribed.

4. Logic and Reasoning

The legal civilian's perception is that law ought to be orderly and compartmentalized, not indeterminate. Among Mexican legal scholars, there is a perception that the common law system is irrational, governed by judicial moral authority and factual *minutiae*.[76] On the other hand, in the civil law system "all jurisprudence is based in written law, general and specific, and codes and contracts that are applied as a fixed point of reference."[77] Logic in the civil law system is deductive (legal principles applied to facts),[78] logic in the common law system is inductive (individual facts give rise to legal principles).[79] "[To] paraphrase

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the Continent of Europe was built by university professors.").

73. *See* Konstantinos D. Kerameus, *A Civilian Lawyer Looks at Common Law Procedure*, 47 LA. L. REV. 493, 494 (1987).

74. *See id. See also* Smith, *supra* note 9, at 88 ("The judiciary in Latin America is essentially a civil service position.").

75. *See* Zamora, *supra* note 14, at 412.

76. *See* Smith, *supra* note 9, at 90.

77. *Id., citing* Lucia Luna, *Marcadas Diferencias en los Sistemas Juridicos de México y Estados Unidos [Marked Differences in the Legal Systems of Mexico and the United States]*, 824 PROCESO 7 (Aug. 17, 1992). Celebrated scholar René David has noted, the "common law . . . was born of procedure . . . . [It] excels in the consideration of concrete problems . . . . It shows a distrust for broad principles and overly abstract generalizations . . . . [It] is not an educating or moralizing law, but . . . [a] technicians' law . . . . Whatever is unrelated to litigation . . . does not concern jurists." RENÉ DAVID, FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY 73 (M. Kindred trans. 1972).

78. A.N. YIANNOPOULOS, LOUISIANA, CIVIL LAW SYSTEM 89 (1977), *cited in* Valcke, *infra* note 90, at 74-75 ("The judicial decision is a conclusion reached on the basis of a syllogism: rules of law furnish the major premise, fact situations form the minor premise, and the conclusion follows with logical necessity"). *See also* Cappalli, *supra* note 66, at 90.

79. As a result, common law judges make extensive use of reasoning by analogy to factually similar prior cases. Jeffrey L. Friesen, *When Common Law Courts Interpret Civil Codes*, 15 WIS. INT'L. L. J. 1, 13 (1996) (observing that "[r]ather than analogizing from legal rules, as is the practice in the civil law, common law judges analogize from

Holmes by inversion, the life of the civil law has not been experience but logic."[80]

Today, the overwhelming majority of the countries in the world have a civil law system. To this end, familiarizing American law students with civilian practice would not only promote integration within NAFTA, but also allow them to be better positioned within the global legal market.

B. The U.S. Legal System[81]

The United States is a common law system with a separation of powers between the state and federal government, as well as within each level of government. For two principal reasons, the United States is a unique common law system. First, U.S. law has developed separately from the law of other common law countries, due to a historical (and ongoing) reluctance on the part of U.S. courts to incorporate decisions of foreign common law courts in deciding matters of domestic law.[82] Second, of all the common law countries, the United States has incorporated the largest amount of statutory and legislative codification. Vast areas of law are codified in the United States. In fact, codification has been so intense and so detailed in recent decades that one scholar has likened the phenomenon to an "orgy of statute making."[83] In other common law countries, such as England, Canada and Australia, arguably there is a greater reliance on prior judge-made law in these areas, most notably contract.

Although many elements of law in the United States are codified, there are still tremendous adaptive adjustments for Mexican lawyers

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similar factual situations."). The result, according to Wolfgang Oehler, *Working With a Code: Is There a Difference Between Civil-Law and Common-Law People?*, 1997 U. ILL. L. REV. 711, 714 (1997) is "[i]n archetypical common-law perspective, law is the fruit of organic growth rather than a more or less complete blueprint of life."

80. Smith, *supra* note 9, at 88, *citing* William J. Bridge et al., *A Different Legal System*, *in* DOING BUSINESS IN MEXICO (1992).

81. A concise yet thorough overview of the U.S. legal system is found in E. ALLAN FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES (3d ed. 1996). Farnsworth provides a synopsis of American legal history, legal education, the legal profession, the judicial system, legal method, and substantive areas of American law.

82. *See* Bell, *supra* note 42, at 20.

83. GRANT GILMORE, AGES OF AMERICAN LAW 95 (1977) (positing that more substantive law is made through statutes than through common law principles). *See also* Oehler, *supra* note 79, at 713 ("we can observe an accelerating growth of codified law in common-law countries.").

seeking to practice in the United States. Gary Bell summarizes aptly the rationale behind this concept. Bell states, "[t]he reality might well be that legislation is becoming extremely relevant in [some] common law countries, and that cases are becoming more and more relevant in civil law countries, but the attitudes of civilians and common lawyers toward legislation and cases differ greatly."[84]

The thrust of these attitudinal differences revolves around the proactive role of the judiciary in American society.[85] The American judge defines the content of the law and has the ability—and the public support—to invalidate legislative or executive acts if these infringe on the Constitution. No Mexican judge is similarly empowered. The dominant role of the common law judge creates a need for some consistency in how judges exercise their power. It is from the need of consistency that the doctrine of precedent—*stare decisis*—emerges. Once a legal principle has been settled by a judicial decision, that decision must be followed by factually similar cases until a superior court invalidates the rationale of the legal principle. The doctrine of stare decisis even operates within statutory interpretation. As a result, the practice of common law focuses on the facts of the case, an attempt to distinguish it from prior cases, and, if need be, the invocation of policy arguments to suggest why prior decisions may be overturned. A civilian attorney would likely prove ineffective in a U.S. court, as the preferred technique would simply be to introduce the code provisions that govern and suggest how they favor the client, without reference to prior decisions and only a cursory discussion of the facts.[86]

Louisiana adds an interesting twist to the landscape of the American legal system.[87] Louisiana law is codified and traceable to Spanish and French civil law. Common law influences, however, are extremely strong. There is a similarity between Louisiana's legal position within the United States and Québec's legal position within Canada. No pretension, however, could be made that the United States is in any way a "mixed" jurisdiction. Nonetheless, the existence of Louisiana as a

84. Bell, *supra* note 42, at 22.

85. The cause célèbre of the independence of the U.S. judiciary is *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Notwithstanding, Smith, *supra* note 9, at 89 reports that, even prior to this decision, "American colonial lawyers were accustomed to viewing the judiciary as a superior source of law. Judges determined what the common law was and whether legislative or executive measures were violative of hierarchically supreme 'Magna Cartas,' such as colonial charters."

86. Stein, *supra* note 51, at 1600-01, provides some interesting anecdotes within the European context.

87. In a sense, so too does Puerto Rico. Federal courts have, on occasion, had to interpret provisions of the Puerto Rico Civil Code. *See* Anda v. Ralston Purina Co., 772 F. Supp. 46, 52 (D.P.R. 1991) (interpreting Puerto Rico Civil Code Art. 1077, P.R. Laws Ann. tit. 31, § 3052), *aff'd*, 959 F.2d 1149 (1st Cir. 1992).

civil law jurisdiction offers a potential bridge between American legal education and the teaching of the civil law.

C. The Canadian Legal System

Canada is generally regarded as a bijuridical or "mixed" legal system. Nine of ten provinces, comprising three-quarters of the population, are common law jurisdictions. The remaining province, Québec, is a civil law jurisdiction. In Québec, the "source" of private law is the Québec Civil Code, originally enacted in 1886 as the Civil Code of Lower Canada. The Québec Civil Code is modeled after French precedents. Québec's annexation to British North America and ultimate accession to the Canadian Confederation was in part based upon allowing the province to retain the legal system bequeathed to it by its original French colonizers.[88] Vestiges of this formal arrangement persist today. For example, it is a customary rule that three of the nine judges on the Supreme Court of Canada be *civilistes* from Québec.[89] Notwithstanding these institutional arrangements, the common law system has a deeply pervasive effect in Québec.[90]

It was only in 1949 that the Supreme Court of Canada became the country's court of last resort.[91] Until then, appeals were allowed to the Judicial Committee of the Privy Council in London, thereby permitting the most important domestic legal decisions—regarding common law as well as Québec civil law—to be made by the Law Lords of the House of Lords.[92] This had a unifying effect among Commonwealth jurisdictions. The law of Canada developed in a manner similar to that of England,

88. Québec Act, 1774, 14 Geo. 3, ch. 83, § 8 (Eng.).
89. Friesen, *supra* note 79, at 15.
90. *See* Catherine Valcke, *Legal Education in a 'Mixed Jurisdiction': The Québec Experience*, 10 TUL. EUR. & CIV. L.F. 61, 64 (1995) ("[T]he current legal scene in Quebec can be described as a hodge-podge of civilian and common-law instruments, at both the level of substantive rules of law, and that of juridical logistics and methodology.").
91. *See* Friesen, *supra* note 79, at 3 n.8.
92. *See id.* at 3. The House of Lords even had the final say in matters of Québec civil law. This creates an interesting anomaly: the court of last resort interpreting a civil code had no civil law expertise. In the case of Québec, it is likely that the effect of the House of Lords was to approach Québec civil law with a common law methodology, thereby further weakening the autonomy of the civil law in Québec. The Supreme Court of Canada, which now has the final say on the interpretation of the Québec Civil Code, has itself been described as "essentially a common law institution." *Id.* (footnote omitted).

Australia, and New Zealand. To this date, Canadian courts will consider the decisions of other Commonwealth courts as quite persuasive,[93] although there is an increasing integration of U.S. law into the equation. Interestingly enough, neither Québec nor Louisiana will place much emphasis on decisions of fellow civil law jurisdictions. For the most part, the civil law in these two regions has developed independently and in a subordinated manner with the overarching common law.

Like the United States and Mexico, Canada is a federal state; but it is somewhat more decentralized, with very important responsibilities falling within the scope of provincial legislative and regulatory power. The penetration of the federal and provincial governments into the lives of Canadians has expanded the domination of common law thinking, even in Québec. Statutory interpretation in Québec—at both the federal and provincial enactment levels—is very similar to that found in the common law provinces. Therefore, the common law approach to precedent, legislative intent and public policy arguments has had a unifying effect on the jurisprudence of all provinces. The extent to which this unification has had a leveling effect on legal education in Canada is further discussed *infra*. This is an important point because it alleviates the demand for cross-education in civil law and common law in order for a Canadian legal practitioner to be competent to practice on inter-provincial legal issues. This denudes the Canadian experience of much use as a model for integrated civil law/common law legal education within the context of NAFTA as a whole.

Canada's political structure is based on the British parliamentary system: this triggers important distinctions in the manner in which legislation is adopted, and somewhat limits the scope of judicial review and public law litigation. Nonetheless, congruence with the U.S. model increased with the 1982 adoption of the *Canadian Charter of Rights and Freedoms (Charter)*.[94] This document considerably expanded the ability of judges to ensure that legislation conforms to constitutional requirements. Today, Canadian judges have quasi-legislative capabilities, and can rewrite offending portions of statutes in order to ensure that those statutes conform with the constitutional guarantees contained in the *Charter*.[95]

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93. *See* Bell, *supra* note 42, at 20.

94. CAN. CONST. (Constitution Act, 1982) pt. 1 (Canadian Charter of Rights and Freedoms) (being Schedule B to the Canada Act, 1982, c. 11 (U.K.)).

95. *See* Schachter v. Canada, [1992] 2 S.C.R. 679 (calling this concept "reading in").

IV. CASE STUDIES OF TRANSNATIONAL LEGAL CONFUSION

The overarching similarities in law, language and culture between Canada and the United States tend to reduce the frequency of cross-border legal misunderstanding.[96] There are anecdotal indications of how confusion as to the legal and political structure of one country complicates the ability of nationals of the other country to conduct business.[97] Nonetheless, the principal *intra*-NAFTA source of confusion arises from the inability of Canadian and U.S. lawyers to provide services and respond to legal processes in Mexico. This reduces itself, in large part, to common lawyers' misunderstanding about the civil law. This confusion affects two levels of activity: (1) when a lawyer must advise a private party on a matter governed by Mexican law or on a matter occurring in Mexico; and (2) when a NAFTA institution, staffed with common law decision-makers, must interpret, determine or be advised on a matter of Mexican law. Examples of the latter category include NAFTA panels established to resolve unfair trade practice cases,[98] panels empowered to interpret and apply NAFTA at large, and dispute resolution in the area of intellectual property.[99] There is also mis-apprehension among domestic actors concerning the role *supra*-national institutions play in each jurisdiction. Although confusion at both the domestic and *supra*-national level breeds inefficiency and transaction costs, the lack of legal sophistication at the level of NAFTA institutions is particularly troubling. Perhaps fleshing out some examples of this confusion could set the stage for investigating how

96. *See* Smith, *supra* note 9, at 85 n.2 ("Canada has its own distinct legal system, but one that shares the same common law tradition as the United States."). However, Smith does not mention that Québec's legal traditions are distinctly different, notwithstanding whatever the congruencies with the common law provinces may currently operate.

97. For example, Québec's French-language labeling and signage requirements can complicate legal matters. Another example is whether provincial or federal law regulates a legal matter; the division of powers is quite different in Canada than in the United States. Such misunderstandings could easily be mitigated by introducing Canadian legal and political structures in pre-existing first-year constitutional law courses or, maximally, through an "Overview of Canadian Law and Institutions" course in American law schools.

98. *See* Smith, *supra* note 9, at 86; *see also* NAFTA, *supra* note 2, ch. 19 & 20. Lawyers and panelists "will be required to apply the law of [another NAFTA country] because the 'law of the importing country' as well as its standard of review will govern in unfair trade disputes." Smith, *supra* note 9, at 86, *citing* NAFTA, *supra* note 2, ch. 9.

99. *See* NAFTA, *supra* note 2, arts. 1714-1716, 32 I.L.M. at 676-78 (discussing the enforcement of intellectual property laws through national judicial procedures).

curricular changes could mitigate similar misapprehensions in the future.

A. *Misdirected Environmental Advocacy*

The NAFTA Preamble provides that trading objectives shall be pursued "in a manner consistent with environmental protection and conservation."[100] It also stipulates that the signatories shall "strengthen the development and enforcement of environmental laws and regulations."[101] Notwithstanding these commitments, American environmental watchdogs remain concerned that Mexico will not enforce its fairly stringent environmental laws.[102] Within the United States (and to a lesser extent, Canadian) legal culture, courts are often regarded as a tool to effect policy change and to ensure that governments respect their commitments. This has given rise to the "public interest litigation" model.[103] Environmental groups operating within this model, have, in the past, sought the intervention of domestic courts and *supra*-national bodies such as the Commission on Environmental Cooperation (CEC) to oblige Mexico to comply with the environmental laws it enacts.[104]

The "public interest litigation" model is not found in civilian jurisdictions such as Mexico. Courts have considerably narrower rules of standing, and judges have considerably reduced powers to interfere

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100. *Id.* pmbl., 32 I.L.M. at 297.

101. *Id.*

102. *See* David L. Hanna, *Third World Texas: NAFTA, State Law, and Environmental Problems Facing Texas Colonias*, 27 ST. MARY'S L.J. 871, 887 n.62 (1996). Increasingly, however, Mexican environmental groups are making use of NAFTA public interest procedures. In 1997, these groups filed a number of claims, including an important challenge to the government of Mexico's decision to build a pier facility at Cozumel without having completed a proper land effects environmental impact assessment as stipulated by Mexican law. The Mexican environmental group was unsuccessful in its previous challenge to the Cozumel decision filed in domestic court, from which it was unable to seek appellate review. It is interesting to see Mexican groups turning to multinational bodies to promote national compliance with domestic environmental laws. Turning toward multinational bodies may thus be a sign of convergence between the practice of public law in Mexico, the United States and Canada. *See* Gustavo Alaniz, Address Before the Section of North American Cooperation, AALS Conference (Jan. 9, 1998) (notes on file with the author, Columbia Law School).

103. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

104. Aaron Holland, *The North American Agreement on Environmental Cooperation: The Effect of the North American Free Trade Agreement on the Enforcement of United States Environmental Laws*, 28 TEX. TECH L. REV. 1219, 1236-37, text accompanying nn.159-164, 1253-55 (1997). *See also* Michael J. Kelly, *Bringing a Complaint under the NAFTA Environmental Side Accord: Difficult Steps under a Procedural Paper Tiger, but Movement in the Right Direction*, 24 PEPP. L. REV. 71 (1996).

with legislative and administrative decision-making. Hence, when American environmental groups turn to courts, or to the CEC, to oblige Mexico to respect its environmental laws, these groups act in a way that creates confusion for the Mexican lawyer. Thus these groups may be following a course that will be ultimately ineffective. The ineffectiveness stems from the fact that, in Mexico's legal structure, an administrative agency—the Secretariat for the Environment, Natural Resources, and Fisheries ("Secretariat")—is responsible for enacting as well as enforcing Mexican environmental laws.[105] No judicial or adjudicative body can interfere with an administrative failure to enforce, since such failures are perceived as policy decisions and are thus immunized from judicial review.[106] Similarly, when statutory "gaps" occur in Mexico, these are filled by administrative regulations and interpretations.

In the United States, judges fill such gaps with their own interpretation based on the common law.[107] Recourse to the Mexican judiciary to review an administrative interpretation may be ineffective because agency decisions, if contested, are handled by petition to the agency itself. In the case of environmental matters, complaints may be brought before the Secretariat. Sanctions upon those who disobey environmental laws are not imposed through the judiciary but, rather, through administrative means.[108] Additionally, as noted by David Hanna:

> In the United States, if a court renders judgment in an environmental case, that precedent will play a vital role in determining how future courts and administrative agencies will resolve similar environmental issues. In Mexico, however, prior similar action by an administrative body or court does not affect subsequent administrative actions.[109]

Thus, a greater familiarity on the part of public interest groups with the procedure and method of the Mexican legal system could result in a more efficient allocation of resources towards the legislature.

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105. Hanna, *supra* note 102, at 888.
106. Holland, *supra* note 104, at 1254.
107. Humberto Cellis, Note, *The Legal Evolution of Mexican Environmental Laws*, 1994 CURRENTS 34; Lawrence J. Rowe, *NAFTA, the Border Area Environmental Program, and Mexico's Border Area: Prescription for Sustainable Development*, 18 SUFFOLK TRANSNAT'L L. REV. 197, 202-03 (1995).
108. *See* Cellis, *supra* note 107, at 38.
109. Hanna, *supra* note 102, at 889.

B. *Curial Involvement in Union Registration*

The North American Agreement on Labor Cooperation, negotiated under the auspices of NAFTA, creates a mechanism to examine the labor practices of the NAFTA signatories to prevent these practices from being diluted in the quest to promote free trade.[110] In a manner similar to environmental matters, concerned parties can file public submissions regarding alleged improper labor practices within NAFTA. These submissions are directed to the National Administrative Offices (NAO), which exist in each jurisdiction and are staffed by nationals.[111] In recent years, U.S. public interest organizations have filed complaints with the U.S. branch of NAO regarding allegedly improper Mexican labor practices.[112] The U.S. NAO panelists' lack of preparation regarding Mexican legal procedures and structures has given rise to unnecessary confusion in NAO hearings and decisions.

One example of this confusion arose in 1994 and early 1995, when allegations of wrongdoing were brought before the NAO regarding, *inter alia*, the refusal of a local administrative board in the Mexican State of Tamaulipas to register an independent union.[113] The board's refusal had previously been upheld by a Mexican court, to which jurisdiction had been obtained by a special writ, called an *amparo*.[114] The *amparo* is a process in Mexican constitutional federal court that can establish federal jurisdiction over any dispute arising from laws or acts of authorities that violate individual constitutional rights.[115] As such, the *amparo* can be used in a limited number of administrative settings. Common law practitioners can experience difficulty coming to grips with this circumscribed notion of curial review.

In the Tamaulipas complaint, the U.S. NAO determined that the Mexican court was incorrect in affirming the local board's decision. Nonetheless, "the NAO confessed that it remained confused about the . . . rationale the Mexican authorities offered to explain the court's decision."[116] In a commentary on the Tamaulipas decision, Fredrick

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110. *See* North American Agreement on Labor Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499.

111. *See* Fredrick Englehart, *Withered Giants: Mexican and U.S. Organized Labor and the North American Agreement on Labor Cooperation*, 29 CASE W. RES. J. INT'L L. 321, 351-52 (1997).

112. *See id.* at 356-57.

113. *See id.* at 357 (discussing U.S. NAO Submission Number 940003).

114. *See id.* at 366.

115. *See* MEX. CONST. art. 107, para. II; Ley de Amparo, para. 76. The constitutional mandate that courts may only decide the case at bar—and precluding the pronouncement of general declarations as to the state of the law—flows from art. 25 of the Constituent and Reform Act of 1847.

116. Englehart, *supra* note 111, at 367.

Englehart candidly remarks that Mexico's "civil law tradition perhaps complicated the issue for the U.S. NAO personnel who are presumably trained in the common law tradition."[117] Englehart notes that "[u]nion registration and *amparo* present complex, often subtle legal issues under Mexico's civil law system."[118] Englehart continues, "[*Amparo*] has no precise analog in U.S. jurisprudence, but combines aspects of injunction, habeas corpus, mandamus, and certiorari. Although in form it is an appeal to federal court challenging the decision of a subordinate body, *amparo* does not compare easily with U.S. judicial review or *stare decisis*."[119]

In accordance with the general absence of a doctrine of precedent in the civil law, *amparo* decisions are case-specific and do not establish law. The only exception in Mexico is if cases brought under *amparo* "have been decided the same way in five consecutive cases by a prescribed majority vote, without an inconsistent ruling . . . ."[120] This creates what is called *jurisprudencia definida*.[121] Barring the existence of *jurisprudencia definida*, *amparo* decisions govern only the specific individuals whose particular rights are affected. A subsequent complainant, even if factually identical to a prior *amparo* decision, must seek the protection of a new and second *amparo* judgment. There is no obligation for the second *amparo* court to follow the prior decision, or even explain why it chooses not to follow that decision. Moreover, even if *jurisprudencia definida* is established, it is not a true source of law, but an auxiliary source; the true source of law vests, in accordance with Mexico's civilian separation of powers doctrine, in the executive and legislature, together with the administrative organs of both levels of government. Hence, it is unclear whether a Mexican court errs when it chooses not to follow *jurisprudencia definida*. But it certainly does not err when it fails to follow prior factually identical *amparo* decisions in the absence of *jurisprudencia definida*.

Regarding the Tamaulipas labor dispute, there were only two prior *amparo* decisions and these did not express the same *ratio*.[122] Thus,

117. *Id.* at 367, n.331.
118. *Id.* at 367.
119. *Id.* at 370.
120. Smith, *supra* note 9, at 89.
121. *Id.* This "is obligatory on lower courts and certain administrative law tribunals, but neither the legislative bodies nor administrative agencies are obliged to conform to these precedents." *Id.*
122. *See* Englehart, *supra* note 111, at 369-71.

there was no precedent. It appears that the U.S. NAO may have misapprehended the jurisdiction of the Mexican court, as well as the formalities of Mexican labor law and the ability of that court to ignore prior decisions. As a result, its report,[123] which impugned the decision of the Mexican local board, and criticized the Mexican court for upholding that decision, may have been based on a misunderstanding. This report, in turn, caused further controversy. In the aftermath, the U.S. Deputy Undersecretary of Labor and his Mexican counterpart "agreed to effectuate a joint program to explain and improve implementation and public understanding of union registration and certification at the federal and state levels in both countries."[124]

V. TRANSNATIONAL LEGAL EDUCATION IN NAFTA MEMBER-STATES

Mexico, Canada and the United States share one essential point: in all three jurisdictions, formal legal education at the university level is the principal tool used to school and train lawyers, and is a prerequisite for admission to the practicing bar. To this end, the obligation to ensure professional competence falls largely on the shoulders of the law schools. In the Mexican case, since there is no independent bar examination, law schools singularly bear this burden.

The Mexican, Canadian and U.S. law schools also share a more disappointing point in common: limited effort has been expended to prepare graduates for transnational NAFTA practice. Although most schools offer comparative law courses, the courses are often not *intra*-NAFTA. Furthermore, the thrust of the comparative law courses tends towards contrasting and critiquing substantive points of law among various jurisdictions. There is generally little focus on preparing students to practice in foreign jurisdictions, or to better understand how lawyers operate within foreign jurisdictions.[125] There are, of course, some exceptions—mostly in Mexico and the United States—which can operate as good models of transnational approaches to legal education. If applied uniformly and widely, these models could help establish a program to allow law students to develop a better familiarity with the other legal systems. In turn, this could mitigate the transnational legal confusion discussed previously and streamline the NAFTA integrative

123. The report was clearly well-intentioned in its desire to facilitate union registration and thereby promote workers' rights. U.S. Nat'l Admin. Off., U.S. Dep't Lab., Public Report of Review: NAO submission No. 940003 31, 32 (1995).

124. Englehart, *supra* note 111, at 373.

125. *See* Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 459 (1989).

process.

A. Legal Education in Mexico

In Mexico, as in the overwhelming majority of civil law jurisdictions, the law degree is pursued at the undergraduate level.[126] As a result, many law students simply wish to obtain a general liberal education. Many students are just seventeen or eighteen years old when they enter law school.[127] Upon graduation, many Mexican law graduates pursue business, government, political careers, and even non-legal positions. This must be contrasted with the U.S. model of legal education, although it is clear that many recent U.S. graduates put their law degree to use outside of traditional legal practice.

It takes five years of study (ten semesters) to complete the Mexican law degree, the Licenciatura en Derecho. Because of its undergraduate nature, the first two years involve both law and general liberal arts, including history, economics, political science and sociology.[128] Some universities require that students complete English language courses;[129] others include accounting, statistics and mathematics within the curriculum.[130] Law courses become more dominant in the latter three years. It is interesting to note that law faculties do not always operate as independent entities within the university structure—as is the case in Canada and the United States—but are often affiliated with or part of the

126. *See* Maria Tomé, *A Comparative, Personal Perspective on Legal Education in the United States and Portugal*, X DIREITO E JUSTICA 213, 230 (1996). This is also the case in Québec, although some students enter the Québec law degree with a prior undergraduate degree in another field. In Louisiana, the study of law is conducted at the graduate level. Interestingly, in many of the common law countries, law is also studied at the undergraduate level (for example: England, Australia, New Zealand). To this end, the notion of instituting a law school at the graduate or professional level is very much a U.S. and Canadian phenomenon.

127. *See* Barker, *supra* note 9, at 114.

128. *See, e.g., Universidad Nactional Autónoma de México* (visited Dec. 5, 1997) <http://www.serpiente.dgsca.unam.mx/rectoria/htm/carrera/dere-k.html> (detailing the curriculum of the Universidad Nacional Autónoma de México).

129. *See, e.g., Licenciado en Derecho* (visited Dec. 5, 1997) <http://www.aemex.mx/academ/licenc/ldere.html> (discussing the five English courses which the Universidad Autónoma del Estado de México mandates).

130. The Universidad de las Americas-Puebla also expects two foreign language requirements within the undergraduate degree. *See Licenciatura en Derecho* (visited Dec. 5, 1997) <http://www.pue.udlap.mx/catalogo/escuelas/edcs_de.html>. The Universidad de Somora also has statistics requirements for the Licenciatura en Derecho. *See Carreras de la Unison* (visited Dec. 5, 1997) <http://www.uson.mx/unison/planes/csociale/derecho.html>.

Faculty of Social Sciences.[131]

Because the demand to prepare students for legal practice is not high, "the legal curriculum remains basically academic, and practical skills and application of law in context are generally not taught."[132] Clinical courses, which are quite popular at Canadian and U.S. law schools, are infrequent in Mexico, although their popularity is growing.[133] A general inattention to clinical legal education is common throughout most civil law jurisdictions worldwide.[134]

Unlike anywhere in Canada or the United States, full-time professors in Mexican law schools are rare. Most faculty members are full-time practitioners and come to the university only to deliver their lectures.[135] Little contact exists between students and faculty. Mentor relationships are generally not a priority. Lectures consist of the practitioner cum professor exposing the relevant sections of the governing law to the students. Notwithstanding their considerable expertise, these teachers often take a dry approach to the law. As a result, the exposé generally proceeds on an abstract level and is not practice-oriented.[136] Classes are regularly large, up to 500 students per class.[137] Given that course-materials often consist of the code (together with legal treatises), and that the lectures do not go beyond these materials, both student attendance and class participation is rare. In some ways the legal treatises are comparable to "hornbooks" in Canadian and American common law education.

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131. *See, e.g., Universidad Nactional Autónoma de Puebla* (visited Dec. 5, 1997) <http://148.228.152.249/planes_estudio/paep.html> (detailing the structure of the Benemerita Universidad Autónoma de Puebla).

132. Barker, *supra* note 9, at 114.

133. For example, the Universidad Autónoma de San Luis Potosi offers four obligatory clinical courses in the final year of its Licenciatura: focusing on criminal law, civil law, the *amparo*, and labor/social benefits. This university also offers an optional course in procedure. *See Licenciado en Derecho (Materias)* (visited Dec. 5, 1997) <http://www.uaslp.mx/fd/ldee.html>. The Universidad Autónoma de Yucatan offers these same four obligatory courses together with clinic work in tax law and administrative law. *See Untitled Normal Page* (visited Dec. 5, 1997) <http://www.uady.mx/~derecho/licencia.htm>.

134. My experience working with civilian students pursuing a LL.M. degree at Columbia University corroborates this. The students were generally unfamiliar with preparing research memoranda, being put in the position of a lawyer and arguing a mock case, or dealing with fact patterns. Participation in law review and legal clinics was also a surprise to them, and many were very eager to become involved in such activities. It may well be that the offerings in clinical legal education available in Mexico might be greater than in other civilian jurisdictions.

135. *See* JAMES E. HERGET & JORGE CAMIL, AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM 93 (1978).

136. *See* Valcke, *supra* note 90, at 123 (outlining the key elements of the "magisterial" approach to teaching the civil law).

137. *See* Barker, *supra* note 9, at 115.

The Mexican examination process is decidedly different than in Canada and the United States. Usually, law school exams in Mexico are oral.[138] Some written work is required for graduation, often a thesis.[139] Separate oral comprehensive examinations are usually required on the thesis itself. After graduation, legal internships or practicums may be offered, but these are generally not required to obtain the Licenciatura en Derecho.[140] The law student is eligible to practice law simply after obtaining the Licenciatura en Derecho. There is no separate or independent bar examination as a pre-requisite to practice.[141] However, the law school student must complete 6 to 12 months of "community service" to qualify for professional certification.[142] For the law graduate, this could include legal work. Integration of legal practice within NAFTA may "up the playing field" and induce the creation of bar admission examinations in Mexico, thereby altering the nature of Mexican legal education. To date, Mexico has shown the least willingness among the NAFTA parties to accommodate foreign attorneys, and will likely require the largest number of structural modifications to meet its chapter 12 obligations.[143]

Transnational legal education within the Licenciatura curriculum is weak. There is little focus on substantive explanations of the common law, or on how the common law works in practice, or on private international law for the matter.[144] One notable exception is the

138. *See id.*

139. *See id.* at n.139, *citing* HERGET & CAMIL, *supra* note 135, at 94.

140. *See id.* at 115-16, *citing* HERGET & CAMIL, *supra* note 135, at 94-95. The Escuela Nacional of the Universidad Nacional Autónoma de México also requires an internship to complete the Licenciatura. *See Universidad Nacional Autónoma de México* (visited Dec. 5, 1997) <http://www.serpiente.dgsca.unam.mx/rectoria/htm/carrera/derek.html>.

141. *See* Barker, *supra* note 9, at 115-116. The "diploma privilege" was eliminated as the standard for admission to the bar in the United States in the 1920s. *Id.*

142. *Id.* at 116.

143. *Id.* at 117-120.

144. For example, the Universidad Autónoma de Yucatan demands only one course in public international law during the ninth semester and one course in private international law during the tenth semesters. *See Licenciatura* (visited Dec. 5, 1997) <http://www.uady.mx/~derecho/licencia.htm#licenciatura>. The Universidad Autónoma del Estado de México has similar requirements. *See Licenciado en Derecho* (visited Nov. 5, 1998) <http://www.uaemex.mx/academ/licenc/ldere.html>. The national law school, *Universidad Nacional Autónoma de México*, does not offer a concentration in international commerce or North American economic integration, although it offers concentrations in public finance, economic law, public law, social law, criminal law, civil law, and public administration. *See Universidad Nacional Autónoma de México*

Universidad de las Americas, a private institution which offers a specialized concentration during the Licenciatura which focuses on private international and U.S. law.[145] One required course in this concentration at the Puebla campus is Derecho Positivo y Procesal de los Estados Unidos, which unwraps the key substantive and procedural principles of U.S. law.[146] The Mexico City campus of the Universidad de las Americas goes even further and requires compulsory courses on the Introduction to the American Legal System and the Introduction to the Canadian Legal System, taught in English during the fourth and fifth semesters respectively.[147] The law school also mandates foreign language requirements. The law school even offers some substantive Mexican law courses in English. In the ninth semester, the law school gives the students the opportunity to select from various concentrations, including one in U.S. Law. The law school offers the following courses, which are taught in English: American Constitutional Law, Environmental Law, Conflicts of Law, Tax Law, Torts, Criminal Law and Criminal Procedure.[148] Programs of this nature are quite unique, and could form the basis of a unified NAFTA curriculum.

For the most part, Mexican attorneys desirous of transnational practice must pursue these interests in graduate studies. Two principal options present themselves: graduate legal studies in Mexico or graduate legal studies abroad (generally the United States).

Mexican universities offer two graduate degrees: the Maestría (Master's) and the Doctorado (Doctorate). The Maestría stretches for two to two-and-a-half years after completion of the Licenciatura. Admission is often geared to Mexican legal practitioners who wish to upgrade and modernize their knowledge of specialized areas of law.[149] Foreign lawyers (generally of Latin American background) are also welcome.[150] An effort is made to promote critical inquiry and prepare candidates for academic and policy work, although this is pursued more vigorously at the level of the Doctorado. Within the context of these

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(visited Nov. 5, 1998) <http://serpiente.dgsca.unam.mx/rectoria/htm/demo2.html>.

145. *See Licenciatura en Derecho* (visited Dec. 5, 1997) <http://207.3.133.19/UDLA/derecho.htm>. The faculty consists of professors trained in Mexican, American as well as Canadian law.

146. *See Plan de Estudios Semestral* (visited Nov. 6, 1998) <http://www.pue.udlap.mx/ catalogo/escuelas/edcs_de.html>.

147. *See Licenciatura en Derecho* (visited Dec. 5, 1997) <http://207.3.133.19/UDLA/derecho.html>. The fact that these courses are taught in English familiarizes the student with the legal language and terminology.

148. *See id.*

149. *See Licenciatura en Derecho* (visited Dec. 5, 1997) <http://148.228.152.249/planes_estudio/paep.html>.

150. *See Degrees Offered* (visited Dec. 5, 1997) <http://207.3.133.19/UDLA/degrees.html>.

degrees, it is possible to obtain a transnational concentration that focuses on a NAFTA practice.

The Maestría includes a common curriculum, together with a specialty. Coursework determines most of the credits, a thesis the remainder. Admission is based on superior performance in the Licenciatura, and sometimes an entrance exam.[151] The common curriculum includes courses such as legal history, political science, and economics, together with courses on pedagogy, research skills and legal writing.[152] Various universities offer different concentrations.[153] Some of these permit the student direct exposure to common law methodology, as well as the transnational practice emerging under NAFTA. The Universidad Autónoma de Nuevo Leon, for example, offers a Maestría in Private International Law. Constitutional, Civil and Commercial Law of the United States and Canada, and Civil Procedure in the United States and Canada, compose two of the compulsory courses.[154] Exchange programs exist between this program and the University of Houston. Admission is competitive, and a prerequisite is a minimum English score of 500 on the TOEFL, together with knowledge of French.[155] The Universidad de Sonora offers a Maestría in Private International Law: a principal goal of this course of study is to focus on the relationships between the juridical systems of Mexico, the United States and Canada.[156] Instruction encompasses common law, English language, private international law and, in addition, contains a thesis component. Faculty members are drawn from the U.S. and Mexico, but

151. *See Untitled Page* (visited Dec. 5, 1997) <http://www.serpiente.dgsca. unam. mx/rectoria/ htm/carrera/dere-k.html>.

152. *See Untitled Page* (visited Dec. 5, 1997) <http://148.228.152.249/ planes_ estudio/paep.htm>.

153. *See, e.g.,* the Benemerita Universidad Autónoma de Puebla, which offers concentrations in Civil and Commercial Law, in Financial Law and in Labor/Social Security Law. *See Untitled Page* (visited Dec. 5, 1997) <http://148.228.152.249/ planes_estudio/paep.htm>. The Universidad Nacional Autónoma de México offers more theoretical, pedagogical and philosophical grounding. *See Untitled Page* (visited Dec. 5, 1997) <http://www.serpiente.dgsca. unam.mx/rectoria/htm/carrera/dere-k.html>.

154. In Spanish, these courses are called "Derecho Constitucional, Civil y Mercantil Estadounidense y Canadiense" and "Sistema Procesal Civil, Estadounidense y Canadiense." *See Untitled Page* (visited Dec. 5, 1997) <http://www.unal.mx/ UNAL/Escuelas/Facultades/fdycs/maderint.html>.

155. *See Untitled Page* (visited Dec. 5, 1997) <http://www.unal.mx/UNAL/ Escuelas/Facultades/fdycs/maderint.html>.

156. *See Maestria en Derecho Internacional Privado* (visited Dec. 5, 1997) <http://www.uson.mx/unison/posgrados/derecho/derecho.htm>.

not from Canada.[157]

The Doctorado is a research degree. There are usually some course requirements, however, stretching over a number of semesters.[158] Entrance is based upon holding a Licenciatura and a Maestría, together with an examination, a research proposal, as well as an interview with the proposed academic supervisor and doctoral committee.[159] Two foreign languages are often required. The universities sponsoring the Doctorado generally offer research supervision in NAFTA subject matter. The Doctorado, however, as a very advanced degree, often leads to a faculty position. The Doctorado is simply not accessible for the vast majority of Mexican law students and lawyers.

As mentioned earlier, the second avenue by which Mexican lawyers familiarize themselves with the law of their NAFTA counterparts is through the common law LL.M. degree (one academic year in duration). The most popular destination for such a degree is the United States, more specifically, the "elite" universities such as Yale, Harvard, Columbia, N.Y.U., and Chicago, and institutions such as American University, the University of Miami and the University of Pittsburgh, which provide more specialized programs for foreign law school graduates.[160] Within the nexus of these studies, students are generally obliged to follow an introductory course in common law and American legal structure,[161] then round out the rest of their program with elective course. In comparison, few Canadian or American common law lawyers spend time studying abroad, or, if they do study abroad, it generally is not in a civilian jurisdiction.[162] The combined effect of Mexican

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157. *Id.*

158. *See, e.g., Doctorado* (visited Dec. 5, 1997) <http://www.anahuac.mx/posgrado/doc/doct1.html#plan>.

159. *See, e.g., Untitled Page* (visited Dec. 5, 1997) <http://www.serpiente.dgsca.unam.mx/post_grado/ult/deder/.html> (discussing the program available at the Universidad Nacional Autónoma de México).

160. *See, e.g., University of Pittsburgh Center for International Legal Education* (visited Nov. 25, 1997) <http://www.law.pitt.edu/cile/welcome.htm>. Southern Methodist University "SMU" also has a NAFTA Law Center and houses an academic journal related exclusively to NAFTA.

161. "United States Legal Methods and Problems," an obligatory course for civil law students enrolled in Columbia University's LL.M. program, runs daily for three weeks in August prior to the beginning of the fall academic term. Afterwards, lectures are held weekly for two hours. *See* JENNIFER QUAID & MARK DRUMBL, SUPPLEMENTARY MATERIALS, UNITED STATES LEGAL METHODS AND PROBLEMS (1997) for an overview of the course content. *See also* MARK DRUMBL & VINCENT DE GRANDPRÉ, SUPPLEMENTARY MATERIALS, UNITED STATES LEGAL METHODS AND PROBLEMS (1998).

162. The different experiences lead to asymmetrical patterns of exposure. One example of asymmetry is St. Mary's University's "Abogados de las Americas" (Lawyers of the Americas). Lawyers of the Americas is a year-long training program offered at Universidad Anáhuac and sponsored by St. Mary's, whose professors go to Mexico to instruct Mexican attorneys on a wide range of topics in U.S. law. There does not appear

graduate programs and the willingness of Mexican lawyers to complete graduate studies either domestically or abroad creates a more pressing need to integrate civilian concepts into the common law curriculum as opposed to the need to integrate common law concepts into the Mexican legal curriculum.[163]

B. Legal Education in Canada

Canadian legal education reflects the country's bijuridical legal culture. Sixteen schools offer academic programs leading to the common law LL.B. degree; five universities offer a course of study leading to the civil law LL.L. or B.C.L. degree. For the most part, the language of instruction of the LL.B. degree is English[164] and the language of instruction for the LL.L./B.C.L. is French. In general, common law schools teach only common law; civil law schools teach civil law and, owing to the nature of the Canadian federal system (together with the constitutional and regulatory apparatus), must teach common law to some degree. Consequently, whereas all civil law lawyers learn quite a bit about the common law, a significant majority of Canadian common law lawyers learn very little about the civil law.[165] In the era of NAFTA, this is somewhat of a lost opportunity.

The LL.B. is obtained after a minimum of three years of full-time study and entry is usually based upon holding an undergraduate degree.[166] Admission to the LL.B. is predicated on undergraduate

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to be a reciprocal arrangement for American attorneys. *See Education in International Law* (visited Nov. 2, 1998) <http://www.westpub.com/Stmary/stmintl.htm>.

163. *See generally,* Zamora, *supra* note 14, at 424:

> Mexican universities and law schools are beginning to stress U.S. studies. Many Mexican and Canadian law students and lawyers enroll in Master of Laws programs offered by U.S. law schools .... It is less common for U.S. lawyers to study in Canada or Mexico, but such studies are likely to increase as employers recognize the relevance of this experience to effective lawyering in the NAFTA region.

Id.

164. The University of Ottawa, Université de Moncton and McGill University offer common law courses in French. McGill University also offers civil law courses in English.

165. For example, the three Canadian participants in Columbia University School of Law's Seminar in Legal Education (Fall 1997)—at which a preliminary version of this paper was discussed on November 26, 1997—who had been schooled at English-Canadian common law schools had hardly had any exposure to Québec civil law.

166. *See* John E.C. Brierley, *Legal Education in Canada*, 72 OR. L. REV. 977, 978-79 (1993).

grades, the LSAT (same examination as in the United States), together with personal accomplishment and background.[167] The law curriculum in Canadian common law schools is quite comparable to that of U.S. law schools.[168] Similar course offerings are available in all years,[169] together with similar opportunities for extracurricular involvement. The Socratic method is used less frequently than in the United States; the lecture format is thus more prevalent. Nonetheless, the case method dominates as the approach to convey information and to structure class readings. Examinations are open book and consist of essays focused on issue-spotting and fact patterns. In the second and third years of law school, students can choose from seminars, courses and independent writing, and may explore law at an interdisciplinary level.[170] Clinical opportunities also abound. Because of the similarities between United States and Canadian law schools, many Canadian common law schools are members of the AALS.[171] Overall, "the legal experience of the average [English] Canadian law student is relatively comparable to that of his [or her] counterpart in the United States."[172] In fact, a considerable amount of American law is already introduced in the Canadian curriculum, certainly in areas such as constitutional law, comparative law, and many of the corporate law courses.[173] Specifically, the University of Windsor incorporates significant discussion of U.S. law into its curriculum, and offers cross-registration with the University of Detroit/Mercy, as well as the possibility of jointly obtaining a LL.B. and American J.D. degree.[174]

Canadian law schools and bar associations share the responsibility of educating lawyers. In every Canadian jurisdiction, there is an

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167. This has been the personal experience of the author. *See* Barker, *supra* note 9, at 107.

168. *See* S.M. WADDAMS, INTRODUCTION TO THE STUDY OF LAW 21 (4th ed. 1992).

169. *See id.* at 23.

170. *See* Barker, *supra* note 9, at 108.

171. *See* Zamora, *supra* note 14, at 424. Interestingly enough, the AALS Executive Committee agreed to invite Mexican law schools to become fee-paid school participants in AALS. *See id.* The AALS has also developed a section on North American Cooperation, which met once again at the 1998 AALS Annual Conference. The author is a member of this section and such has been his experience and observation.

172. Barker, *supra* note 9, at 108.

173. Some U.S. states, such as New York, recognize the Canadian LL.B. as an equivalent of the American J.D. As a result, Canadians with the LL.B. degree can directly register for the New York bar examination and, once this is passed, be admitted to the New York bar without the need to complete any supplemental academic work in the U.S. Other state bar associations are not as generous, however.

174. *See Aims and Objectives of the Faculty of Law* (visited Nov. 3, 1998) <http://www.uwindsor.ca/law/>. The University of Windsor Faculty of Law is also affiliated with the Canadian-American Research Center, which undertakes research projects relevant to Canadian-American relations in areas such as international trade, environment and the delivery of legal and quasi-legal services. *See id.*

apprenticeship requirement, together with provincial bar association certification exams. These often focus on the "black letter" of the law, together with professional responsibility and financial management issues. Before sitting the provincial bar examinations, students are required to attend "bar admission" courses (unlike in the United States, where there is neither an apprenticeship requirement—except for Vermont and Delaware—nor mandatory bar courses).

Civil law schools are located in Montréal, Sherbrooke, Québec City and Ottawa.[175] These permit entry after junior college[176] (two years of study after secondary school). However, a junior college diploma is a prerequisite for entry into any university program. To this end, law is studied as an undergraduate subject. Only a few Québec law students have completed an undergraduate degree, or even undergraduate studies, prior to registering for the LL.L. or B.C.L.[177] Notwithstanding their youth, a significant majority of law students entering Québec civil law schools plan on pursuing a legal career, as opposed to their Mexican colleagues.[178]

The civil law degree is minimally three years in duration. Admission thereto is based on previous academic performance and personal qualifications; there is no LSAT requirement. However, some schools, for example the Université de Montréal, conduct their own entrance "aptitude tests." Basic courses are similar to those in English Canadian law classrooms,[179] with the exception of torts, contracts and property, which are based on the Québec Civil Code. Lecture format is used, but student participation is solicited and obtained,[180] unlike in Mexico. Study tools include the Québec Civil Code, legal treatises, and statutory instruments, as well as compendia of case law (although not nearly as relevant as in English Canada, but certainly more important than in Mexico).

Lectures in Canadian civil law schools tend to go beyond exposing the

175. *See* Valcke, *supra* note 90, at 83-95 (providing a comprehensive summary of civilian legal education in Québec, together with an evaluation of the pedagogy and curriculum).

176. *See id.* at 83-84. These are called Colleges of General and Professional Education ("CEGEP"). Secondary school in Québec lasts for five years, and elementary school for 6 years. *See id.* at 12.

177. *See id.* at 83-84.

178. *See id.* at 90.

179. *See id.* at 84.

180. *See id.* at 126.

principles of the Code.[181] Class sizes will not exceed 100 students in the more heavily subscribed courses.[182] Examinations are generally three hour, open-book, written tests, which often involve fact pattern and "issue-spotting" questions, although there may be more problems of shorter length than the standard common law "three hour, three fact pattern" exam. There are clinical opportunities, together with law review writing. Clerkships are also possible, even during law school. Summer job opportunities and the type of legal employers prevalent in the market are very similar to those in English Canada and the United States. After completion of the civil law degree, students complete a six to eight month apprenticeship, then a one-year bar admission course in order to be certified to practice in Québec.[183] The Québec bar admission requirements are thus slightly more onerous than in the other provinces, and clearly more so than in Mexico.

Only two Canadian universities, McGill University[184] in Montréal and the University of Ottawa,[185] offer both the common law and civil law degree. In the case of McGill, these degrees are integrated into a four-year trans-systemic "National Programme" in which students learn not only the salient points of each system, but are taught comparatively.[186] This is the only integrated program in Canada. The University of Ottawa permits its civilian graduates to complete a common law degree in one supplemental, but separate year; the reverse is also possible. There are also reciprocal agreements between other common and civil law schools permitting graduates of one to obtain the other law degree in one year.[187] These are not heavily subscribed. Some Canadian law

181. *See id.* at 127.

182. This has been the experience and observation of the author.

183. *See* Valcke, *supra* note 90, at 69.

184. *See Programmes of Instruction* (visited Nov. 3, 1998) <http://www.law.mcgill.ca/academics>. *See also* Roderick A. Macdonald, *The National Law Programme at McGill: Origins, Establishment, Prospects,* 13 DALHOUSIE L.J. 211 (1990).

185. *See National Program* (visited Nov. 3, 1998) <http://www.uottawa.ca/academic/commonlaw/eng/lll-llb.html>.

186. *See Untitled Page* (visited Dec. 5, 1997) <http://www.law.mcgill.ca/calendar/faculty.htm>. The National Programme is vaunted as enabling all students "to examine, critically, the foundations of both Canadian legal systems." *Id.* Additionally, "the interdependence of the modern world means that many legal problems transcend individual legal systems . . . [a] knowledge of both the civil law and the common law is therefore an asset." *Id.* McGill also houses an Institute of Comparative Law. This Institute directs an International Business Law Programme, which sponsors research and colloquia on various aspects of the international trade system. Notwithstanding the intellectual depth of its comparative civil law/common law program, McGill does not offer any course regarding civilian practice in Mexico or transnational developments under NAFTA. *See id.*

187. For example, the Université de Sherbrooke offers an exchange with Queen's University through which graduates from one university can obtain the law degree

schools permit international exchanges to promote learning in other legal systems.[188]

Of great importance is the fact that the nature of civil law in Québec is such that a graduate of the LL.L. degree program will not be prepared to practice in Mexico without independent exposure to Mexican legal methodology.[189] Unlike most civil law societies, stare decisis operates in Québec. Judges are empowered to issue a wide variety of equitable remedies and have the power to invalidate any legislative scheme on constitutional grounds.[190] Judicial review is patterned on the common law model. Unlike the civil law model, Québec judges are appointed from the practicing bar, take personal responsibility for their judgments, and occasionally dissent.[191] Civil procedure rules are essentially identical in Québec to the common law provinces and differ considerably from the civilian prototype.[192] Criminal law and procedure is standard throughout Canada and is based on common law precedence; in fact, federal law, which applies throughout Canada, tends to employ common law traditions.[193] Both the criminal and civil laws of evidence derive from British common law sources and are generalized through all of the provinces. Due to the constitutional division of powers in Canada, matters of *inter*-provincial trade and commerce fall within the legislative competence of the federal government.[194] Therefore, the regulation of the Canadian free trade zone is legally enforced under the purview of common law method.

As a result, civil law students are schooled in common law

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offered by the other university in one additional year of studies (30 credits). *See Untitled Page* (visited Dec. 5, 1997) <http://www.usherb.ca/DROIT/common.html>. Similar exchanges exist between the University of Western Ontario and Université Laval, and between Osgoode Hall Law School and the Université de Montréal.

188. For example, the University of Ottawa organizes common law/civil law exchanges in a broad array of countries, including Mexico, Chile, Argentina, Peru and the United States. It is the University's view that "in an era of growing trade globalization, a study abroad experience can be an asset in future job searches." *See Untitled Page* (visited Dec. 5, 1997) <http://www.uottawa.ca/academic/commonlaw/prog_res.html>.

189. Nor, it goes without saying, without familiarity with legal Spanish.

190. *See* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), §§ 24 (1), 52.

191. *See* Stein, *supra* note 51, at 1603.

192. This has been the experience of the author.

193. *See* Barker, *supra* note 9, at 106. In Canada, federal law covers vast areas including taxation, competition policy and divorce.

194. *See* CAN. CONST. (Constitution Act, 1867) 30 & 31 Victoria, c. 3 (U.K.), § 91(2).

techniques.[195] This explains the familiarity they have with the common law, as well as the distinctive nature of Québec civil law from other civilian systems. Additionally, discussion of American law is found in the Québec civil curriculum, although to a lesser degree than in the LL.B. curriculum. In the end, as noted by Valcke:

> [Quebec's] typical law graduate cannot be described as a solid civilian jurist. If anything, law graduates from Quebec may in fact be better trained at playing the game of common law. At the very least, they are, from academic and professional standpoints alike, barely indistinguishable from their common law peers.[196]

Thus, civil law education in Québec does not provide a comfort level with Mexican legal practice. Canadian legal education, notwithstanding the apparently bijuridical nature of Canadian law practice, cannot serve as a model for the integration of common law and civil law within a NAFTA legal education. Course materials in the common law schools do not present transactional problems arising from civil law/common law differences; to some extent this is because such transactional problems do not tend to arise frequently.[197] At the present moment NAFTA does not have an overarching legislative body which will implement common law traditions throughout the region. It may be that such an overarching body is created in the future. If so, and if this structure infuses a common law tradition throughout NAFTA, the need for bijuridical legal education to be a competent NAFTA legal practitioner will decline, just as it has declined in order to be a competent national practitioner in Canada (nonetheless, it remains an absolute prerequisite to be a competent practitioner within Québec).

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195. Some civilian schools offer courses on the common law. These are given in French. Some of these courses unpackage the theoretical background of the common law, others approach the common law comparatively. *See, e.g., Untitled Page* (visited Dec. 5, 1997) <http://www.ulaval.ca.sg/CO/C1/DRT/DRT-11449.html>. But these courses tend to be superfluous given the penetration of the common law methods into the Québec curriculum.

196. Valcke, *supra* note 90, at 65.

197. For example, the following random sample of Canadian common law books was consulted. The volumes are all silent on the presentation of cross-border transactions or disputes that could trigger common law/civil law substantive or methodological differences. *See generally* BRUCE L. WELLING, CORPORATE LAW IN CANADA: THE GOVERNING PRINCIPLES (2d ed. 1991); IAN F.G. BAXTER, THE LAW OF BANKING (1981); S.M. WADDAMS, THE LAW OF CONTRACTS (3d ed. 1993); GORDON F. HENDERSON, TRADE MARKS LAW OF CANADA (1993); ERIC C.E. TODD, THE LAW OF EXPROPRIATION AND COMPENSATION IN CANADA (1976) (noting a fleeting reference on page 12); DAVID PHILLIP JONES & ANNE S. DE VILLARS, PRINCIPLES OF ADMINISTRATIVE LAW (1994); C.R.B. DUNLOP, CREDITOR-DEBTOR LAW IN CANADA (1981); THOMAS G. FEENEY, THE CANADIAN LAW OF WILLS (1982) (reference to Québec civil law on testaments but no elucidation of cross-border legal issues or engagement of the student therein); ANGER & HONSBERGER, ANGER AND HONSBERGER REAL PROPERTY (2d ed.1985).

However, such an institution has not yet been created within a NAFTA context, nor does it loom even remotely on the horizon. To this end, the need for training in both the common law and the civil law, together with the acquisition of a familiarity with the political structures of all three member-states, remains important. In the absence of legislative integration, the role of the lawyer to act as an architect of harmonization is all the more crucial.

Preparing Canadian legal service providers (both from Québec and the common law provinces) for NAFTA, Mexican and, ultimately, Latin American practice thus remains a challenge. There has been limited activity in this area. Only some Canadian common law schools offer courses in the civil law.[198] These are usually focused on Québec and Europe, include Roman Law, and are often theoretical in nature. These courses are generally optional and ancillary.

Offerings in the international business and trade area are broader; nonetheless, there is limited attention to NAFTA or Mexico, and no attention to the mechanics of legal practice.[199] For example, University of Saskatchewan has five courses in international and trade law: only one focuses on a North American perspective, and it makes no mention of Mexico in the course description, only of the United States and the Canada-U.S. Free Trade Agreement.[200] In fact, this is somewhat of a

198. These include the University of British Columbia. *See UBC Law: Second- and Third-Year Curriculum* (visited Dec. 5, 1997) <http://www.law.ubc.ca/handbook/curriculum/2ndyear-a.html>; and the University of Windsor, *Untitled Page* (visited Dec 5, 1997) <http://www.uwindsor.ca/faculty/law/study.html>. The University of Toronto usually offers a course on Civil Law (not offered in the 1997-98 academic year). *See Course Enrollments 1996-1997* (visited Nov. 2, 1998) <http://www.law.utoronto.ca/syllabus/syll-1.html#116>.

199. Dalhousie University has a course in International Trade Transactions and a Seminar in International Trade Law that references NAFTA. *See Dalhousie University Academic Calendar* (visited Nov. 4, 1998) <http://www.registrar.dal.ca/calendar/gradprof/laws/laws2130.html>. The Université de Moncton (a common law school offering instruction in French) includes a "survey" of NAFTA in its International Commercial Law course. *See Untitled Page* (visited Dec. 5, 1997) <http://www.umoncton.ca/droit/Ecole_droit>. The University of British Columbia's International Trade law's course presents an "overview" of NAFTA. *See UBC Law: Second- and Third-Year Curriculum* (visited Dec. 5, 1997) <http://www.law.ubc.ca/ handbook/curriculum/2ndyear-a.html>. The Université de Sherbrooke offers a course on the Law of Free Trade that discusses NAFTA and MERCOSUR, as well as a specific course on North American International Economic Law. *See Untitled Page* (visited Dec. 5, 1997) <http://www.usherb.ca/Programes/cours/DRT/drt566.html>.

200. *See International and Trade Law* (visited Nov. 2, 1998) <http://law.usask.ca/curriculum/intnatl.html>.

pattern throughout Canadian legal education.[201] University of Victoria's outline of its International Trade Law course is illustrative:

> International trade constitutes a crucial 30 percent of Canadian economic activity and this course explores the major legal and policy aspects of the international trade regime in which the Canadian economy operates. The principal emphasis is on the General Agreement on Tariffs and Trade (GATT) and Canada's international obligations thereunder, as well as Canada's trade relationship with the United States. A central feature of this course is the attention paid US trade law, its operation and impact on Canada.[202]

The University of British Columbia has seminars in Introduction to Asian Legal Systems, Chinese Law, Japanese Law and European Union Law, but there is no similar comparative offering for Mexican law, or Latin American law in general.[203] There are no courses on Legal Spanish.

In sum, there are grounds for concern that Canadian law schools offer insufficient training for Canadian lawyers to meet the transnational market demands and opportunities provided under the NAFTA.

C. Legal Education in the United States

Law school in the United States is a three-year, full-time course of study leading to the Juris Doctor ("J.D.") degree. An undergraduate degree is almost always a prerequisite to admission. Like Canada, admission decisions in the United States are based upon undergraduate grades, the LSAT score, as well as personal accomplishment and background. Many universities in the United States are privately owned. The cost of legal education in American private institutions is considerably higher than in Canadian or Mexican private schools. The wide price differential may affect the type of student who attends the institution as well as the expectations of that student.

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201. *See, e.g.*, Université Laval's International Economic Law course: *Droit international économique* (visited Dec. 5, 1997) <http://www.ulaval.ca/sg/CO/C1/DRT/DRT-11428.html>. *See also* the University of Windsor's International Business Transactions course, together with its offerings on "Canada/U.S. Issues": *University of Windsor* (visited Dec. 5, 1997) <http://www.uwindsor.ca/faculty/law/study.html>. Queen's University's "International Business and Law Program" involves courses "oriented to the European business community." *See International Business and Law Program* (visited Dec. 5, 1997) <http://qsilver.queensu.ca/law/calendar9798/isc9798.html>. The University of Manitoba offers no courses on civil law or NAFTA. *See Course Descriptions* (visited Nov. 2, 1998) <http://www.umanitoba.ca/faculties/law/Courses/courseinfo.html>.

202. *See The Curriculum* (visited Nov. 2, 1998) <http://www.law.uvic.ca/calendar/page3060.html#Title02>.

203. *See UBC Law: Second- and Third-Year Curriculum* (visited Dec. 5, 1997) <http://www.law.ubc.ca/handbook/curriculum/2ndyear-a.html>.

U.S. legal education is characterized by the case method.[204] The reading load tends to be significant and class discussion goes considerably beyond the reading materials. Some professors may occasionally use the Socratic method, although its use appears to be declining.[205] Traditional first year courses include Torts, Contracts, Property, Criminal Law, Civil Procedure, and Constitutional Law; some schools offer a Legal Method or Introduction to Law course as well. Examinations are held at the end of the course and are open-book. Evaluation is based on "issue-spotting" and "fact-pattern" essays. The upper-year class curriculum varies from school to school. Local law schools gearing students toward practice in the local bar may tend to focus on clinical education and state law. The "national" law schools may tend more towards theoretical and interdisciplinary discussions of the law. The plurality of approaches to legal education among the law schools[206] is one factor that distinguishes U.S. legal education from Canadian and Mexican legal education. For the most part, completion of a recognized[207] law degree is a prerequisite for bar admission, although local bars also mandate their own examinations which require successful completion.

Louisiana houses a number of universities which offer common law as well as civil law education. Unlike Canada, however, there is only one degree—the *juris doctor* ("J.D."). Louisiana law schools offer a broad variety of civil and common law courses. At some schools, students take these courses within an integrated whole; at others, students must decide whether they aspire to practice in Louisiana (and are thus in a civil law stream) or outside Louisiana (and are thus in a common law stream). Loyola University in New Orleans is an example of the latter approach. Students either take their private law courses exclusively within the purview of the Louisiana Civil Code or within the general common law; some accommodation can be made for a student who

204. *See* Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517 (1991).

205. *See* Sandra Craig McKenzie, *Storytelling: A Different Voice for Legal Education*, 41 KAN. L. REV. 251, 252 (1992).

206. *See* FARNSWORTH, *supra* note 81, at 15-16. Chapter 2 of Farnsworth's book provides a concise snapshot of U.S. legal education.

207. Within the U.S. context, this means being accredited by the American Bar Association ("ABA"). The ABA is the national professional association for lawyers in the U.S. Forty-nine of the fifty-five admitting jurisdictions in the United States do not allow graduates of non-ABA approved law schools to sit for the local bar examinations. *See* Barker, *supra* note 9, at 121.

wishes to study both.[208] Tulane University has a similar structure.[209] On the other hand, Louisiana State University ("LSU") fuses the study of both legal systems by obliging first year students to complete the following courses: Contracts, Torts, Louisiana Civil Law System, Basic Civil Procedure I and II, Criminal Law, Legal Writing and Research, Obligations, Civil Law Property, Constitutional Law I, and Administration of Criminal Justice.[210] Hence, LSU law students are advantaged in terms of developing a familiarity with both common law and civil law as of their initiation to law school.[211] LSU also welcomes a Center of Civil Law Studies, which is a starting point for potential transnational legal training; both LSU and Tulane University also offer a Master of Civil Law ("M.C.L."), one of the only degrees of its kind in the United States.[212] As is the case throughout much of Louisiana, however, the transnational focus is geared more towards Europe than towards Latin America.[213] To this end, Louisiana law schools, despite

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208. *See Juris Doctorate Degree Requirements* (visited Nov. 2, 1998) <http://www.loyno.edu/law/degree.requirements.html>.

209. *See Tulane Law School Online Catalog* (visited Nov. 2, 1998) <http://www.law.tulane.edu/admit/catalog/frame.html>. Tulane offers a broad swath of civil law courses, some of which incorporate some comparative elements between civilian jurisdictions. *See Comparative and Civil Law* (visited Nov. 2, 1998) <http://www.law.tulane.edu/admit/catalog/sec_6/comparative.html>.

210. *See Law Center Bulletin 1997-98* (visited Nov. 2, 1998) <http://www.lsu.edu/guests/lsulaw/bulletin.html>.

211. LSU emphasizes the curriculum can assist students in the global economy:

> The Law Center's civilian tradition is especially advantageous in the field of international law.... With increasing world trade, the need for understanding our foreign trading partners' legal systems is vital to America's economic interests and requires lawyers skilled in those legal theories.
>
> ....
>
> Louisiana's adherence to the principle of codification of the law ... makes the study of Louisiana's legal institutions a useful preparation for persons expecting to practice or to deal with the law of [civilian] jurisdictions.

Law Center Bulletin (visited Nov. 4, 1998) <http://www.lsu.edu/guests/lsulaw/bulletin.html>.

212. *See id.*

213. For example, Tulane offers the following courses in its "Comparative and Civil Law" section: Comparative Law: European Legal Systems, European Community I, European Community II, European Legal History, European Obligations. *Tulane Law School Catalogue—Course Descriptions* (visited Nov. 25, 1997) <http://www.law.tulane.edu/admit/catalog/sec_6/comparative.html>. There is no course in this section, nor in the "International and Comparative Law Section," explicitly dealing with NAFTA, Latin America or Mexico. The closest reference is in a Trade and Environment Seminar, which does review how environmental concerns have been integrated into regional economic blocs, such as the European Union, NAFTA and MERCOSUR. *See International and Comparative Law Course Listings* (visited Nov. 2, 1998) <http://www.law.tulane.edu/admit/catalog/sec_6/international.html>. Tulane also offers a specialized training program called "European Legal Studies" for its J.D. and M.C.L. students. J.D. students who complete the 15-credit curriculum of designated courses will receive a certificate of specialization in European Legal Studies. *See European Legal*

their comparative advantage in offering both common law and civil law courses, are not at the forefront of NAFTA legal education in the United States.

In fact, *intra*-NAFTA legal education in the United States is spotty. It is either very well developed, or undeveloped.[214] Outside of Louisiana, there are very few civil law method courses. In Louisiana, as previously discussed, those courses that law schools offer tend not to be geared to Mexico in particular nor Latin America at large. In some cases, such courses are offered outside of the traditional law school curriculum. For example, St. Mary's University School of Law, located in Texas, offers a transnational training program in conjunction with the Universidad de Monterrey, and also houses the Texas-Mexico Bar Association.[215]

Many law schools offer comparative law courses. What is less clear, however, is the extent to which these courses prepare the graduate for transnational legal practice, or assist the graduate in understanding how legal practitioners within the relevant foreign jurisdiction generally cogitate issues, address problems, and draft documents. There are two broad concerns: (1) the comparative law courses are often theoretical,

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Studies (visited Nov. 3, 1998) <http://www.law.tulane.edu/admit/ catalog/frame.html>. Tulane does offer two "mini-courses" (one credit courses, two to three hours a week for two weeks) in the Latin American area for the Spring 1998 semester: International Trade and Investment in Latin America, and State Reform and Human Rights in Latin America.

214. Some commentators are generally disappointed with the quality and extent of international legal instruction in the United States *writ* large. "It is ironic that American law schools which so successfully managed to create 'national' rather than 'local' legal education which transcends the borders of the fifty states are failing to create a 'global' legal education for their 21st century graduates." Fountoukakos, *supra* note 11, at 47. The development of "national" legal education in the United States as a model for the creation of "NAFTA *supra*-national" legal education is an interesting possibility. However, all fifty American states share a cultural, legal and political heritage that is more intimate than the heritage shared by the NAFTA parties. Accordingly, the obstacles American legal educators had to overcome in creating a national legal education are much smaller than those faced in the quest to formulate a NAFTA curriculum. Nonetheless, fleshing out lessons learned from the American domestic experience and superimposing those lessons into a NAFTA context remains a worthwhile exercise and a potential subject of future scholarly endeavor.

215. *See Education in International Law* (visited Nov. 25, 1997) <http://www.westpub.com/Stmary/stmintl.html>. Additional examples include: the University of Arizona, with its National Center for Inter-American Free Trade; the University of New Mexico, which houses the U.S.-Mexico Law Institute; the University of Houston's Mexican Legal Studies Program; the University of Miami, which offers a Masters of Laws in Inter-American law and houses *The Inter-American Law Review.* Case Western Reserve University has a history of education in U.S.-Canadian relations.

focusing on substantive differences often in narrowly circumscribed areas of the law; and (2) they tend to shy away from Latin America or NAFTA, dwelling within the East Asian or European confines.[216] Another concern is that important elements of what would constitute a pro-NAFTA curriculum remain diffuse and scattered among various law schools. Thus, there is a need to consolidate these course offerings and then make this unified package available in a broad array of law schools.

For example,[217] Yale Law School offers a Comparative Law course taught by Professor Damaska who, thirty years ago, had authored a seminal law review article contrasting civilian and common law educational techniques.[218] The course focuses on the "contrast between the American legal system and systems of continental Europe."[219] Interestingly enough, it analyzes, among other things, "procedural peculiarities of nonadversarial proceedings against the background of a civil lawsuit... with demonstrations of comparative legal analysis on the example of a few substantive legal problems."[220] Yale does not offer a civil law methods course or a NAFTA course. Stanford does not have a civil law course either. Although Stanford offers a broad array of comparative and international trade courses, it does not include a course or seminar on Mexico, Latin America, Canada or the NAFTA, and this notwithstanding the fact it offers instruction in Chinese and European Community legal institutions.[221] Interestingly enough, Stanford does offer a course called "Spanish for Lawyers," which would constitute an essential part of a NAFTA curriculum.

The University of Chicago is an example of an institution that emphasizes comparative and international law but may neglect Latin America, Mexico, and the civil law at large. For example, Chicago offers courses in Comparative Constitutional Law (focused primarily on the German and French constitutions); Competition Law of the

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216. In addition to the examples proffered *infra*, see *International Law* (visited Dec. 12, 1997) <http://www.suffolk.edu/law/int_law/int_brochure.html> (detailing Suffolk University's International Law Program). *See also* Zamora, *supra* note 14, at 424 ("Comparative law courses in U.S. law schools have often focused on European law, as the basis of the civil law tradition, rather than on Latin American, and especially Mexican, law.").

217. There are over 170 accredited law schools in the United States. Henry Ramsey, Jr., *The History, Organization and Accomplishments of the American Accreditation Process*, 30 WAKE FOREST L. REV. 267, 267 (1995). Due to space constraints—not to mention declining marginal utilities—this discussion cannot be as exhaustive as for Canada and Mexico, but remains an informative overview.

218. *See* Mirjan Damaska, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PA. L. REV. 1336 (1968).

219. *See* BULLETIN OF YALE UNIVERSITY (Yale University), Aug. 10, 1997, at 47-48.

220. *Id.*

221. *See Studying Law at Stanford* (visited Nov. 5, 1998) <http://www-leland.stanford.edu/group/law/apply/study/courses.html>.

European Community; Corporate Governance in Japan; Economic Regulation in Japan; Citizenship, Migration and Race and Sex Discrimination in the Law of the European Union; Integration of European Financial Markets; International Finance (focus on United States, European and Japanese regulatory systems); International Trade Regulation (emphasis on the principal obligations of the WTO/GATT, some coverage of NAFTA); Japanese Economic Law; and Japanese Law.[222] There is one course in Roman Law, which is not offered in 1997-1998. Harvard, for its part, offers a course in Legal Aspects of Transnational Economic Activity, and another seminar, Legal Profession: Transnational Practice, which focuses on professional responsibility issues in the provision of global legal services.[223] Harvard also offers a course on NAFTA, which explores the range of trade obligations undertaken by NAFTA parties.[224] Harvard does not offer a course on Mexican law, a legal Spanish course, or any civil law course.

New York University ("N.Y.U.") offers a broad array of comparative and international economic law courses with specific reference to Chinese Law, Japanese Law, South Asia, the E.U. and Islamic law; neither Mexico nor Latin America appears to be given singular treatment.[225] Comparative courses in accounting, constitutional law, and corporate law contrast American and E.U. models.[226] N.Y.U. does offer an Introduction to the Civil Law course, which orients the student towards the "method and basic institutions of the civil law."[227] The course description further provides that the course considers "the general approach of the civil law lawyer to legal problems and the structure and essential topics of the civil law . . . [that] are illustrated by references to the codes of Western European and Latin American countries.[228]

The materials for this course include articles on the historical

222. *See The University of Chicago* (visited Nov. 5, 1998) <http://ap-www.uchicago.edu/acapubs/law95/html/2nd_yr._.html>.

223. *See Elective Courses and Seminars* (visited Nov. 6, 1998) <http://www.law.harvard.edu/Administrative_Services/Registrar/98Catalog/descriptions/electives.html>.

224. *See Elective Courses and Seminars* (visited Nov. 2, 1998) <http://www.law.harvard.edu/Administrative_Services/Registrar/98Catalog/descriptions/electives.html>.

225. *See Records & Registration: International Legal Studies* (visited Nov. 28, 1997) <http://www.nyu.edu/law/records_registration/courses/105.html>. There is one course, International Trade Regulations, which comprises discussion of the NAFTA.

226. *See id.*

227. *Id.*

228. *See id.*

evolution of Roman, French, Italian and German law.[229] Overviews of the French, German, Italian and Chilean Civil Codes are presented. One recurrent theme in the materials is the public law/private law distinction in civil jurisdictions, and how this can be juxtaposed with the American model. Some very insightful contrastive commentaries are included on judicial organization and civil procedure. The course contains a series of substantive cross-jurisdictional problems: ownership (the civil law does not generally recognize beneficial or trust ownership), and consideration (understood very differently in terms of enforceability at common law than at civil law). The course ends with an interesting analysis of judicial law-making power within the French law of torts, which includes a review of civil law judgments.

The University of Texas ("UT") proposes a proactive program, which could serve as a good model for a wider scale NAFTA curriculum. UT's attention to transnational NAFTA developments is singular. UT offers a joint J.D./Master of Arts degree in Latin American Studies, for which a language background in Spanish or Portuguese is required.[230] This program is designed for students wishing to study law and Latin American issues in an integrated and interdisciplinary manner, for potential use in governmental services or legal practices with a Latin American focus. Within the contours of the J.D. degree, UT proposes specific comparative courses in the area of Mexican law and Latin American law.[231] These are geared to "create in the students a better feeling as to the Latin American world and a more realistic approach to the living law of Latin America."[232] The Introduction to Mexican Law course goes a long way to filling the gap in the North American legal curriculum fleshed out by this paper. A seminar is also offered on legal issues related to the implementation of NAFTA.[233] International trade and investment courses additionally consider NAFTA and Latin America at large. A course on English and French contract law is also offered.[234] So, too, are international legal research seminars.

229. I am indebted to the kindness of Professor Michael Schwind, who teaches this course at N.Y.U. Professor Schwind took the time to discuss the course and made available a complimentary copy of the course materials. Michael A. Schwind, *Materials for Introduction to the Civil Law,* New York University School of Law (copy on file with author, Columbia Law School).

230. *See Joint Degree Programs* (visited Dec. 8, 1997) <http://www.utexas.edu/law/acadaff/acadprog/jontdeg.html#Heading4>.

231. *See Untitled Page* (visited Dec. 8, 1997) <http://www.utexas.edu/law/crsfiles/sprcourse.html#Heading48>.

232. *Id.*

233. *See Untitled Page* (visited Dec. 8, 1997) <http://www.utexas.edu/law/crsfiles/sprseminar.html#Heading2>.

234. *See Untitled Page* (visited Dec. 8, 1997) <http://www.utexas.edu/law/crsfiles/sprcourscont.html>.

Notwithstanding the thoroughness of this program, there is no course introducing the American student to law in Canada, which should, after all, form part of a comprehensive NAFTA curriculum.

One final program worth reviewing is that of American University's Washington College of Law, which offers a wide selection of courses in the area of public and private international law, including a specific seminar on NAFTA.[235] A joint J.D./MA in international affairs is also available, which permits a concentration in the Americas.[236] More to the point, however, is American University's NAFTA Exchange Program.[237] The Program, organized in conjunction with three Canadian law schools and three Mexican law schools, allows American University's J.D. students to spend one semester at a law school in another NAFTA jurisdiction. The participating Canadian law schools include both civil law and common law schools. Due to governmental funding sources, the Exchange Program will sponsor each participant's travel and some living expenses. These sorts of exchange programs have proved very successful in the European Union and there is no reason to doubt their effectiveness within the North American context.

D. Summary

This survey of the state of legal education in the NAFTA member-states is cause for both concern and opportunity. For starters, there is considerable room for improvement in terms of acquainting the student with the nuts-and-bolts of legal practice within other NAFTA jurisdictions, specifically in terms of familiarizing common law attorneys and students with the Mexican civilian system. There are some precedents, though, and the challenge lies in distilling the elements of these into a comprehensive course, offered among a broad swath of law schools.

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235. *See Spring 1998 Courses* (visited Nov. 4, 1998) <http://www.wcl.american.edu/pub/sp1998.html>. American University also participates in the Inter-American Moot Court Competition; it has also established a LL.M. in Gender Studies which invites selected students from Latin America. *See also* Dean Grossman, Address to the Section on Graduate Programs for Foreign Lawyers at the AALS Conference (Jan. 8, 1998) (notes on file with author, Columbia Law School).

236. *See JD/MA in International Affairs* (visited Jan. 14, 1998) <http://www.wcl.american.edu/pub/InternationalAffairs.html>.

237. *See NAFTA Exchange Program* (visited Jan. 14, 1998) <http://www.wcl.american.edu/pub/Nafta.html>. The NAFTA Exchange Program is now in its third year of operation.

VI. A THREE-STEP PLAN TO NAFTA-IZE THE LEGAL CURRICULUM

A. Required Course in "The Practice of Civil Law Within NAFTA" for Common Law Students

PURPOSE

- To allow American and Canadian lawyers to develop a familiarity with basic concepts of civil law as applied primarily in Mexico.[238]
- To allow American and Canadian lawyers the opportunity to develop a comfort level with the decision-making process throughout the civil law systems (Mexico in particular) by examining the major institutions and the function of substantive and procedural law within them.[239]
- To provide the students with the tools to communicate effectively with Mexican colleagues. To assist the students in deciding when a client's activities will trigger issues of Mexican law. To help the students evaluate advice clients have received on Mexican law and to allow the students to explain such advice to clients.
- To provide a common law lawyer with the skills necessary to think like a civil law lawyer when appropriate.
- To provide students with the opportunities to develop a familiarity with legal research and writing in a civilian jurisdiction.
- To introduce students to the legal obligations and effects of NAFTA.
- To expose the students early on in their legal education to the cultural base of law and how law can take different forms and play different roles in various societies and cultures, thereby promoting an understanding of and appreciation for diversity.

STRUCTURE

- Traditional lecture format with an emphasis on mandatory class participation.
- Instruction and legal writing undertaken in English. There will be

238. The extent to which Québec could be integrated within the curriculum is discretionary. The focus on Mexico stems from the fact that the practice of law in Mexico appears to cause the greatest amount of transnational legal confusion and appears to have received the least academic attention.

239. This is adapted from the University of Victoria Faculty of Law's first year "The Legal Process" course, which is an introduction to the Canadian common law. *See The Curriculum* (visited Dec. 5, 1997) <http://www.law.uvic.ca/calendar/page3060.html#Title02>.

a session introducing Spanish legal terminology and vocabulary. A separate section with instruction and writing in Spanish could be arranged for those with the requisite language skills.

- 45 hours (three hours per week) with five hours in small-group legal writing sessions reviewing civilian legal drafting assignments which will be prepared outside of class (for a total of three credits).
- Courses to be offered in the second term of the first year of law school (ideally right after the student has completed a course in Common Law Legal Methods or Introduction to American or Canadian Law).[240]
- Student performance evaluated based primarily on examination, secondly on legal writing assignments, and thirdly on class participation.

OVERVIEW OF THE SUBJECT MATTER

- Survey of NAFTA, including its processes, structures and institutions, and development of NAFTA *jus commune* in certain areas, such as the environment and labor.
- Discussion of Mexico's general legal history, focusing on political structures and the "reception" of the civil law.[241]

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240. The Common Law Legal Methods or Introductory Course should make some mention of Canadian law for U.S. students, and some mention of U.S. law for Canadian students. Fountoukakos underscores why it is important to offer an "international" law course in the first year of law school:

> Traditionally, law students interested in international law subjects would choose them as electives in their second or third year of law school. This is not satisfactory if our aim is to produce lawyers who think like international lawyers. By the second or third year law students have been so indoctrinated by domestic private law concepts, procedures and language that it is simply too late to expect them to radically alter their approach and perception of law and free themselves from the confines of provincialism. By the time they have their first substantial contact with international law, American students approach the subject as American lawyers: they view it as interesting, challenging, stimulating but exotic and foreign. It is outside the boundaries of domestic law and it does not form an integral part of it.

Fountoukakos, *supra* note 11, at 53-4.

241. Part of the challenge of developing a course involves designing a reading list. In this portion of the article I refer to potential articles to flesh out certain aspects of the skeleton course proposal. This is clearly in an embryonic stage and is subject to change and modification. A good bibliography of Mexican legal materials is FRANCISCO AVALOS, THE MEXICAN LEGAL SYSTEM (1992). As for the development of Mexican law,

- Explanation of the role of lawyers, judges and academics in the civil law legal process, comparing the similarities and differences to the common law model.[242] This portion of the course should draw back to civil law theory,[243] Roman law,[244] and the European codification process.[245]
- Discussion of legal justification at civil law and how it may differ from common law.
- Discussion of Cartesian deductive logic within the civil code[246] and the teleological approach to code interpretation. Discussion of the notion that the code is much more than just a transcription of the state of the law, but is a source of law. Discussion of the limited role of precedent. Discussion of how academic writings and treatises are used.
- Exposé of the Mexican Constitution, Civil Code of the Federal District, and other codes and principal statutes.
- Explanation of the limited roles of judges as sources of law in Mexico and review of occasional occurrences of judge-made law

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GUILLERMO F. MARGADANT S., AN INTRODUCTION TO THE HISTORY OF MEXICAN LAW (1983), could be a good introduction. *See also* HERGET & CAMIL, *supra* note 135; KENNETH L. KARST & KEITH S. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA (1975); MERRYMAN & CLARK, *supra* note 41. *See also* JORGE A. VARGAS, MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS (West Group, 2 vol., 1998) (an example of a comprehensive text book which could serve as a primary reference volume for the course).

242. Important is the historical reluctance of the civilian lawyer to act as a transactional counsel to commercial deals. Although dissipating, vestiges of the reluctance still exist in civilian jurisdictions and affect the nature of lawyering. *See* Shapiro, *supra* note 8, at 42-45.

243. A potential reading list on this subject might include: Friesen, *supra* note 79; F.H. Lawson, *A Common Lawyer Looks at the Civil Law*, *in* THE THOMAS M. COOLEY LECTURES, FIFTH SERIES (University of Michigan 1955); DAVID & BRIERLEY, *supra* note 41; MERRYMAN, *supra* note 41.

244. Some existing law school courses in Roman law could provide a blueprint for the most important readings. One helpful survey volume is H.F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW (1952).

245. Clearly, the Latin American and Mexican experience cannot be understood in the absence of European developments, since it was the continental civil law model that was first "introduced" in Mexico. Professor Schwind's materials, *supra* note 229, contain some excellent articles in this regard, including excerpts from the following: Harold J. Berman, *The Origins of Western Legal Science*, 90 HARV. L. REV. 894, 895-897, 898-899, 903-906 (1977); Max Rheinstein, *The Approach to German Law*, 34 IND. L. J. 546, 548-553 (1969); Joseph Dainow, *The Constitutional and Judicial Organization of France and Germany and Some Comparisons of the Civil and Common Law Systems*, 37 IND. L. J. 9-17, 27-50 (1961). Another possible addition not found in Professor Schwind's materials is Stein, *supra* note 51.

246. One of the most important goals of the course is to eliminate cross-cultural clashes in legal reasoning, and give students the flexibility to operate in both systems. In order to do so, the tendency to establish "rhetorical preferences" in favor of the logic of the domestic legal system ought to be curbed. *See* Ramsfield, *supra* note 19, at 158-59.

and curial interpretation in France and Germany.[247] Dissection of a Mexican civilian judgment which is contrasted with a common law judgment and concepts such as *stare decisis*, *ratio*, dissent, *obiter*, and overruling. Discussion of the limited use of policy arguments before Mexican courts and truncated ability of civilian judges to make policy.

- Assessment of how gaps in the law are filled in each legal system.
- Overview of the Mexican legislative process and federalism.[248]
- Overview of Mexican legal institutions: courts, administrative agencies, and tribunals, including the factors that most influence decision-making.
- Discussion of Mexican civil procedure, including problems of fact finding and evidence, how matters are litigated, attenuated rules of discovery and pre-trial motions, the inquisitorial role of judges; and *amparo*.[249]
- Explanation of how a civil law lawyer in Mexico would approach a legal or transactional issue, focusing on a wide array of problems in all fields;[250] then contrasting this to how a common law attorney in the United States (or Canada) would approach the same issue.
- Discussion of the approaches and attitudes of civil law and common law negotiation, mediation, and dispute resolution.
- A substantive introduction to certain areas of Mexican law: perhaps six one-hour lectures on contract/tort law, property law (focusing on agrarian reform and ownership, specifically Article 27 of the Mexican Constitution), penal law, taxation law, public law and social/labor law (specifically Article 123 of the Mexican Constitution).[251]
- Discussion and review of Mexican treaties with the United States

247. *See* Appendix I to Professor Schwind's materials, *supra* note 210, for a good set of readings.

248. RODOLFO MARTÍNEZ, THE MEXICAN FEDERAL SYSTEM: ITS OPERATION AND SIGNIFICANCE (1968) may be a starting point for source materials in this area.

249. *See, e.g.*, Hector Fix-Zamudio, *A Brief Introduction to the Mexican Writ of 'Amparo,'* 9 CAL. W. INT'L L. J. 306 (1979).

250. *See, e.g., Mexico, in* COMMERCIAL AND INVESTMENT LAW: LATIN AMERICA (Andrea Bonime-Blanc ed. 1995).

251. For Spanish speaking students, these can be accompanied with readings from any of the Mexican legal *diccionarios* (digests); translated versions are available for those not conversant in Spanish. Vargas, *supra* note 241, provides an overview of twenty substantive areas of Mexican law.

and Canada.

- Review some of the fundamental principles that penetrate many areas of law and are common to all NAFTA jurisdictions: for example burden of proof, legal personality, possession, ownership, and limited liability.
- Specific overview of Mexican corporate/commercial law and practice. Answering how transactions are completed,[252] and what the role of the lawyer is therein.
- Exposure to Mexican lawyering techniques and civilian trial advocacy,[253] including the non-adversarial nature of some of the proceedings,[254] the limited presence of the media in the courtroom, and reduced transparency.[255]
- Analysis of legal research in Mexico.[256]
- Focus on legal writing and drafting exercises in NAFTA countries. Ideally, these written exercises should include a petition to court, a contract, a land deed, and a short memorandum. Students should complete these exercises in small groups outside class with an instructor's guidance.
- Analysis of the Mexican legal profession structure, including state regulation as opposed to the self-regulation found in Canada and the United States.
- Discussion of professional responsibility and parameters circumscribing what a Mexican lawyer can and cannot do,[257] specifically focusing on solicitor-client relationships, privilege and confidentiality.
- Identification of future trends in the Mexican legal system.
- Analysis of legal education in Mexico which answers how Mexican colleagues learn the law, why the case-method model is not used in civil law legal education, and why the civil law legal education system focuses on adjudicative skills rather than the advocacy skills fostered in common law education.[258]

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252. On this point a helpful addition to the reading list would be: William J. Bridge et al., *A Different Legal System, in* DOING BUSINESS IN MEXICO (1992). *See also* GENERAL SECRETARIAT, ORGANIZATION OF AMERICAN STATES, A STATEMENT OF THE LAWS OF MEXICO IN MATTERS AFFECTING BUSINESS (1970).

253. *See, e.g.*, Peter G. Stein, *Judge and Jurist in the Civil Law: A Historical Interpretation*, 46 LA. L. REV. 241 (1985).

254. *See, e.g.*, Stein, *supra* note 51, at 1598-99.

255. *See, e.g.*, Zamora, *supra* note 14, at 410-11.

256. In terms of a civil law research and writing course, the courses currently available at McGill and Tulane universities can constitute a helpful general precedent.

257. A comparative review of the codes of professional conduct would be a very useful part of this exercise.

258. *See* Juergen R. Ostertag, *Legal Education in Germany and the United States—A Structural Comparison*, 26 VAND. J. TRANSNAT'L L. 301, 324-25 (1993).

- Discussion of the civil law and institutions in Québec. This discussion should identify how Québec's civil law system and institutions affect Canadian legal practices and also identify how Québec's civil law differs from Mexico's civil law. This discussion should remind U.S. law students of Louisiana's own unique legal situation.
- Discussion of how disadvantaged groups may be excluded in civil law societies and the role of the law in social marginalization. Answering if there are any differences as to common law societies and, if not, whether the differences between civil and common law jurisdictions are more procedural than substantive, or just a "matter of style".[259]
- Finally, instructors should underscore points of convergence between common law and civil systems and encourage students to explore this convergence based on their having developed a familiarity with both systems.

ADDITIONAL CONCERNS

- Law schools should introduce both Mexican and civil law examples in all legal courses, so that the NAFTA curriculum does not become pedagogically pigeon-holed, but, instead, forms part of the general law school experience.[260]
- Law schools should contemplate introducing language and translation courses in legal Spanish and legal French.
- Law schools should offer an elective "Practice of Civil Law Within NAFTA" course for second- and third-year students. Local bar associations should also consider whether current practitioners could take a similar course as part of continuing legal education and whether the course should be a prerequisite to bar admission.
- Instructors should introduce and use actual transnational problems

259. *See* Basil S. Markesinis, *A Matter of Style*, 110 LAW Q. REV. 607 (1994). Excerpts of Markesinis' article would be a wonderful addition to a reading list.

260. The University of Windsor, a Canadian school, succeeds in this regard. For example, Windsor's copyright law course includes exposure to "trade related copyright concerns (e.g. GATT, NAFTA)." *See Program of Study* (visited Nov. 2, 1998) <http://www.uwindsor.ca/law>. *See also* Sexton, *supra* note 10, at 333, for a survey of the importance of integrating transnational concerns throughout the entire law school curriculum, and the results of that integration within N.Y.U.'s Global Program.

throughout the course to facilitate discussions.

- Note that the subject-matter set out previously is quite broad and, as such, is intended to constitute a wide array of potential themes. If the subject matter proves too ambitious for the allotted course time frame—and it may even be too heavy for 45 teaching hours—the instructor could design the course so that certain themes could be reduced or eliminated, but the course would still remain an integrated whole.

B. A Clustered Curriculum Leading to NAFTA Certification

As a second step, it is worthwhile to explore how to inject the curriculum with a cluster of courses to prepare students for legal activity under NAFTA. Many of the issues addressed in "The Practice of Civil Law within NAFTA" course could simply be divided and expanded within a series of six or seven three-credit courses, which could include a seminar writing requirement. One additional element should be a compulsory "Introduction to Canadian and Québec Law" course for American students, along the lines of the analogous course currently offered in some Mexican law schools. Ultimately, legal educators may wish to investigate whether successful completion of this cluster could lead to a certification in NAFTA legal practice. For example, Tulane University currently permits J.D. students who complete fifteen hours of designated courses to receive a certificate of specialization in European Legal Practice.[261]

Language instruction in Spanish, French and ultimately Portuguese should be a key component of this certification program. The design of these language courses could be based on some of the foreign language for lawyers courses offered at the University of Pittsburgh's law school, which apparently allow law students to quickly develop basic proficiency and communicate legal concepts.[262] Another precedent might be the wide variety of legal English courses currently offered by Mexican law schools. Focus should also be had on the translation of contractual and other agreements.

Along with language training, the proposed program should require a clinical component in which students engage in simulated courtroom procedures and negotiations characteristic of Mexico or Québec. Another idea worth exploring is the development of cross-border moot

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261. *See Tulane Law School—International Law Program Brochure* (visited Nov. 25, 1997) <http://www.law.tulane.edu/admit/brochure/intllaw/page#.html>.

262. *See The University of Pittsburgh Center for International Legal Education—International Studies Curriculum* (visited Nov. 25, 1997) <http://www.law.pitt.edu/cile/curric.html#Courses>.

court competitions that are held in conjunction with a civil law university. Clinical work in mock NAFTA arbitration panels or before actual NAFTA adjudicative bodies, such as CEC, would be a valuable educational experience. Additionally, the certification curriculum ought to offer a course on document drafting within a broad variety of Mexican, Québec and other Canadian settings, thereby permitting the student to develop a practical familiarity with forms and precedents in all NAFTA jurisdictions. A student exchange to a Mexican or Québec university might also be part of the certification requirement. The broad variety of exchanges between European Union universities (and the program being developed at American University, discussed *supra*) could offer a helpful guide for structuring such exchanges and recognizing equivalencies. Such exchanges can serve to develop cultural familiarity in a more intuitive way than classroom instruction.

C. A Common NAFTA Degree

A reciprocally recognized university degree preparing the bearer to competently practice in all NAFTA jurisdictions and entitling the bearer to so practice would be the ultimate stage of the harmonized mobility of legal service providers. It is worthwhile investigating the broad brushstrokes of how legal education and certification throughout the three NAFTA parties could be fully standardized. This can take several forms:

- A law degree identical in all three jurisdictions;[263]
- A special graduate degree, eligible to those having completed the domestic law degree and awarded after one additional year of studies[264] (this additional degree could comprise the educational background to automatically be able to write the bar in each of the NAFTA subnational licensing jurisdictions or qualify as a foreign legal consultant); or
- Simple recognition of the cross-border equivalency of completing the courses described in the NAFTA certificate discussed

263. One problem with this option is that it is not realistic to consider making Mexican legal education a graduate degree, or to remove the graduate school element from Canadian and American legal education.

264. An advantage with this option is that currently licensed practicing lawyers could "go back to school" and be properly trained to effectively work in other NAFTA jurisdictions.

previously.

At this stage, it is premature to consider the details of a standardized transnational degree, which would substantively prepare the student for practice in each jurisdiction and permit market entry. What is important, however, is raising awareness of the need for the development of such a degree, and encouraging discussions among legal educators about how best to arrive at such standardization. Linkages would have to be established with the practicing bar. National and local bar associations would have to arrange any cross-jurisdictional certification. These bar associations would also arrange for the development of a potential NAFTA bar. Raising the consciousness of these issues is important as NAFTA parties continue to negotiate the details of the integration of legal service providers.

VII. CONCLUSION

The European experience with pedagogical integration among civil and common law jurisdictions reminds us how, in the absence of disciplined efforts by educators, the lag time between the creation of open markets and effective education for individuals operating within those markets can be quite long. Whereas the ability of E.U. lawyers to provide cross-boundary services was first established in 1977,[265] European law schools are still working on developing a harmonized curriculum and fully integrated law degree. If NAFTA law schools demonstrate pedagogical leadership and coordination, this lag time could be considerably shortened. Hence, North American law schools can effectively prepare future common law lawyers in the ways of the *civiliste.* Such preparation carries benefits beyond NAFTA. For example, at the global level the General Agreement on Trade in Services also creates a framework for liberalization in, among other things, legal services.[266] Lessons from our experiences with NAFTA can help prepare

265. Council Directive 77/249 EEC of March 22, 1977 to Facilitate the Effective Exercise by Lawyers of Freedom to Provide Services, 1977 O.J. (L 78) 17. In 1989, reciprocal recognition of university degrees was established within the EC, which permitted attorneys to become more easily licensed within each of the member states' bar associations. *See* Council Directive 89/48 EEC of December 21, 1988 on a General System for the Recognition of Higher-Education Diplomas Awarded on Completion of Professional Education and Training of at Least Three Years' Duration, 1989 O.J. (L 19) 16.

266. Annex II of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, I.E.L. I-B 64 (1994) [hereinafter GATS]. Obligations found under NAFTA, such as the development of mutually recognizable professional standards and the licensing of foreign legal consultants, are more demanding than the commitments under GATS.

law schools for an ultimate free market of legal service providers on a truly global scale.


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